Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL ET AL.,
Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals departed from basic principles of judicial restraint by (a) failing to defer to the Federal Communication Commission's interpretation of its equal employment opportunity regulations for broadcasters and cable operators, (b) striking down those regulations on their face prior to their implementation, and (c) effectively overruling statutory provisions mandating those regulations.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

I. Parties

A. Petitioners

Minority Media and Telecommunications Council
African American Media Incubator
Alliance for Community Media
Alliance for Public Technology
American Civil Liberties Union
Black College Communications Association
Civil Rights Forum on Communications Policy
Cultural Environment Movement
Fairness and Accuracy in Reporting
League of United Latin American Citizens
Minority Business Enterprise Legal Defense and Education Fund
National Asian American Telecommunications Association
National Asian Pacific American Legal Consortium
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association for the Advancement of Colored People
National Association of Black Journalists
National Bar Association
National Council of La Raza
National Hispanic Foundation for the Arts,
National Hispanic Media Coalition, including its Los Angeles, New York, Chicago, Tucson, Albuquerque, Phoenix, and San Antonio Chapters
National Latino Telecommunications Taskforce
National Urban League
People for the American Way

Project on Media Ownership
Puerto Rican Legal Defense and Education Fund
Rainbow/PUSH Coalition
Telecommunications Research and Action Center
Women's Institute for Freedom of the Press
National Organization for Women
Center for Media Education
Feminist Majority Foundation
Pennsylvania Lesbian and Gay Task Force

B. Respondents

Maryland-District of Columbia-Delaware Broadcasters Association, Inc.
Alabama Broadcasters Association
Alaska Broadcasters Association
Arizona Broadcasters Association
Arkansas Broadcasters Association
California Broadcasters Association
Colorado Broadcasters Association
Connecticut Broadcasters Association
Florida Association of Broadcasters
Georgia Association of Broadcasters
Hawaii Association of Broadcasters
Idaho State Broadcasters Association
Illinois Broadcasters Association
Indiana Broadcasters Association
Iowa Broadcasters Association
Kansas Association of Broadcasters
Kentucky Broadcasters Association
Louisiana Association of Broadcasters
Maine Association of Broadcasters
Massachusetts Broadcasters Association
Michigan Association of Broadcasters
Minnesota Broadcasters Association
Mississippi Association of Broadcasters

Missouri Broadcasters Association
Montana Broadcasters Association
Nebraska Broadcasters Association
Nevada Broadcasters Association
New Hampshire Association of Broadcasters
New Jersey Broadcasters Association
New Mexico Broadcasters Association
New York State Broadcasters Association
North Carolina Association of Broadcasters
North Dakota Broadcasters Association
Ohio Association of Broadcasters
Oklahoma Association of Broadcasters
Oregon Association of Broadcasters
Pennsylvania Association of Broadcasters
Radio Broadcasters Association of Puerto Rico
Rhode Island Broadcasters Association
South Carolina Broadcasters Association
South Dakota Broadcasters Association
Tennessee Association of Broadcasters
Texas Association of Broadcasters
Utah Broadcasters Association
Vermont Association of Broadcasters
Virginia Association of Broadcasters
Washington State Association of Broadcasters
West Virginia Broadcasters Association
Wisconsin Broadcasters Association
Wyoming Association of Broadcasters
Federal Communications Commission
United States of America
United Church of Christ, Office of Communication, Inc.
(expected to petition separately)

II. Rule 29.6 Statement

Petitioners are each non-profit organizations. No Petitioner or its parent has issued any shares or debt securities to the public.

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Petitioners Minority Media and Telecommunications Council, *et al.* and National Organization for Women, *et al.*[1] respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 236 F.3d 13, and reprinted at App. 1a. The opinion of the court of appeals denying rehearing and the dissent from the denial of rehearing *en banc* are reported at 253 F.3d 732, and reprinted at App. 20a. The Federal Communication Commission's report and order is reported at 15 F.C.C. Rcd. 2329, and reprinted in relevant part at App. 49a.

JURISDICTION

The court of appeals issued its decision denying rehearing *en banc* on June 19, 2001. The Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including October 17, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * * ."

47 C.F.R. § 73.2080 is reprinted at App. 37a.

Relevant portions of *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*

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[1] Petitioners Minority Media and Telecommunications Council, *et al.* and National Organization for Women, *et al.* were two groups of intervenors that filed separate briefs in the court below, but join together in filing the instant Petition.

and Termination of the EEO Streamlining Proceeding, Report and Order, MM Docket Nos. 96-16, 98-204, 15 F.C.C. Rcd. 2329 (2000), are reprinted at App. 49a.

Relevant provisions of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended at 47 U.S.C. § 554 *et seq.*), are reprinted at App. 269a.

Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended at 47 U.S.C. § 334 *et seq.*), are reprinted at App. 276a.

47 C.F.R. § 73.2080 (1992) is reprinted at App. 281a.

47 U.S.C. § 554 is reprinted at App. 286a.

STATEMENT

Introduction. This case concerns the constitutionality of regulations adopted by the Federal Communications Commission ("FCC") in fulfillment of its longstanding efforts and statutory obligation to ensure that broadcasters and cable operators, who hold valuable public licenses or authorizations, provide equal opportunity in their employment practices.

In 1998, the Court of Appeals for the District of Columbia Circuit struck down the FCC's former equal employment opportunity ("EEO") rules. *Lutheran Church–Missouri Synod* v. *FCC*, 141 F.3d 344, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998). The FCC thereafter drafted new EEO rules to avoid the concerns identified in *Lutheran Church*. The new rules contain no quotas or preferences of any kind, and neither require nor encourage broadcasters to make race– or gender–based employment decisions. To the contrary, the new rules explicitly prohibit employment discrimination on the basis of race, gender, and national origin. The new rules do require

broadcasters and cable operators to make information about employment opportunities widely available. Broadcasters can satisfy this basic obligation by selecting one of two supplemental recruitment measures. A broadcaster that selects "Option A" is required to undertake several recruiting programs from a menu of thirteen choices, such as participating in job fairs or sponsoring internship programs. Alternatively, a licensee can select "Option B," which allows broadcasters to create their own recruitment programs and report to the FCC the recruiting efforts undertaken and the race and gender of job applicants.

Respondent state broadcasters associations challenged the new EEO rules on both statutory and constitutional grounds. A panel of the court of appeals rejected the statutory challenges, as well as the constitutional challenge to Option A. But the lower court held that the reporting requirement of Option B unconstitutionally "pressures" broadcasters to make recruiting decisions on the basis of race. The panel struck down the rules in their entirety, and refused to sever Option B from the remainder of the rules or uphold the rules as they pertain to recruitment of women. A sharply divided court, voting 5–3, denied petitions for rehearing *en banc*.

1. History of the FCC's Equal Employment Opportunity Regulations. The FCC's efforts to ensure that broadcasters recruit new employees in a nondiscriminatory manner originated over thirty years ago in *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 F.C.C.2d 766, 766 (1968). That proposal was justified by a "[n]ational policy against discrimination in hiring," and by the privileged status that broadcast licensees maintain as recipients of valuable public

benefits.[2] *Id.* at 769–70. In 1969, the FCC formally adopted rules prohibiting broadcasters from discrimination in employment on the basis of race, religion, and nationality, and required stations to establish, maintain, and carry out specific practices designed to assure equal employment opportunity. *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240, 248 (1969).

In the order adopting the 1969 EEO regulations, the Commission proposed, and subsequently adopted, supplemental rules requiring licensees to submit statistical data and more detailed written programs. *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 F.C.C.2d 430 (1970). Those rules required licensees and applicants for licenses to describe their equal employment programs, *id.* at 432, and required licensees

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[2] That policy was also justified by the history of discriminatory practices by or involving the Commission, and by broadcasters. The Commission did not award any broadcast licenses to minority-controlled entities before 1956. Antoinette C. Bush & Marc S. Martin, *The FCC's Minority Ownership Policies from Broadcasting to PCS*, 48 Fed. Comm. L.J. 423, 439 (1996). The Commission also had a record of accepting and perpetuating discriminatory practices by licensees. For example, in 1955, the FCC awarded a license to a segregationist that built a one-story movie theater to evade Louisiana law requiring admission of blacks to one story of a two-story theater because limiting admission of blacks "to theatre balconies appears to be legal in Louisiana." *Southland Television Co.*, 10 Rad. Reg. (P&F) 699, *reconsideration denied*, 20 F.C.C. 159 (1955). In 1965, the FCC merely "admonished" a Mississippi licensee after riots ensued when that station urged listeners to physically prevent James Meredith from enrolling in the University of Mississippi. *Columbus Broad. Co.*, 40 F.C.C. 641 (1965). A more complete statement of the FCC's history of discriminatory practices was presented to the Commission in the rulemaking proceeding that led to the rules at issue. See 1 Comments of EEO Supporters, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity rules and Policies and Termination of the EEO Streamlining Proceeding* at 104–16 (Mar. 5, 1999) (Ct. App. J.A. 414–26).

with five or more employees to annually submit forms reporting on their employment of minorities. *Id.* at App. B. In requiring the submission of such data, the Commission stated: "We have not suggested that such data for any particular year would demonstrate the existence of discrimination at any station. What we do believe is that it is useful to show industry employment patterns and to raise appropriate questions as to the causes of such patterns." *Id.* at 431.[3]

Prior to 1987, the FCC's enforcement of its EEO rules focused on whether licensees satisfied "processing guidelines," which involved a comparison of a licensee's actual employment of women and minorities with the overall availability of those groups in the local labor market. *EEO Processing Guideline Modifications*, 46 Rad. Reg. 2d (P&F) 1693, *reconsideration denied*, 79 F.C.C.2d 922 (1980). In 1987, the Commission modified its approach and adopted a policy measuring compliance with the EEO rules based on a licensee's efforts at compliance. *Broadcast EEO Amendments*, 2 F.C.C. Rcd. 3967 (1987). Although the FCC retained the processing guidelines, see *id.* at 3974, the Commission's focus shifted to the licensee's efforts to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice." 47 C.F.R. § 73.2080(b).

Congressional enactments have endorsed, strengthened, and, in some circumstances, mandated the FCC's EEO rules. For

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[3] The FCC first applied EEO rules to the cable television industry in 1972. *Amendment of the Commission's Rules to Require Operators to Show Nondiscrimination in Their Employment Practices*, 34 F.C.C.2d 186 (1972). Those rules were expanded in 1978, requiring nondiscrimination and an ongoing program of specific measures to ensure equal employment opportunity. *Nondiscrimination in Employment Policies and Practices*, 69 F.C.C.2d 1324 (1978).

instance, in 1984, Congress enacted detailed EEO requirements applicable to cable television systems.[4] Those requirements sought to "codif[y] and strengthen[] the Commission's existing equal employment opportunity regulations." H.R. Rep. No. 98–934, at 86 (1984). In 1992, Congress codified the FCC's then-existing EEO requirements for broadcast television and extended the cable television EEO requirements to all other multichannel video programming distributors.[5] In the 1992 Act, Congress recognized that "females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries" and that "rigorous enforcement of equal opportunity rules and regulations is required in order to effectively deter racial and gender discrimination." App. 276a–277a. Further, Congress directed the FCC to report the effectiveness of its EEO rules "in promoting the congressional policy favoring increased employment opportunity for women and minorities" and to advance "such legislative recommendations to improve equal employment opportunity in the broadcasting and cable industries as it deems necessary." App. 280a.

2. The *Lutheran Church* Decision. In 1997, the Lutheran Church–Missouri Synod sought review of an FCC determination that the Church had violated the FCC's EEO regulations by making insufficient efforts to recruit minorities for employment at two of its stations. A panel of the District of Columbia Circuit held that the rules did not survive constitutional scrutiny. *Lutheran Church–Missouri Synod* v. *FCC*, 141 F.3d 344, 351–52 (D.C. Cir. 1998). The court ruled

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[4] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984). In 1995, the FCC adopted rules to implement the EEO provisions of the 1984 Act. See *Amendment of Part 76 Cable EEO Rules*, 102 F.C.C.2d 562 (1985).

[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1498 (1992).

that the FCC's "processing guidelines," used to assess compliance with the EEO rules as part of the license renewal process, "pressure[d] stations to maintain a workforce that mirrors the racial breakdown of their 'metropolitan statistical area.'" *Id.* at 352. The court denied rehearing, 154 F.3d 487 (D.C. Cir. 1998), and rehearing *en banc*, with four judges dissenting. 154 F.3d 494 (D.C. Cir. 1998). In its denial of rehearing, the panel made clear that its holding did not "mean that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny." 154 F.3d at 492.

3. The FCC's New EEO Rules. Following *Lutheran Church*, the FCC adopted new EEO rules attempting to synthesize its Congressional mandate to enforce equal employment opportunity rules with the *Lutheran Church* decision. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report and Order, 15 F.C.C. Rcd. 2329 (2000) ("R&O"), App. 49a–268a. The new rules eliminated the processing guidelines found unlawful in *Lutheran Church*, but retained the basic requirement that broadcasters refrain from employment discrimination, as "discrimination by broadcasters and cable entities is manifestly contrary to the public interest and cannot be tolerated." *Id.* ¶¶ 65, 72, App. 104a, 109a–110a. The Commission also sought to eliminate the heavy reliance by broadcasters upon "word-of-mouth" recruiting, to "ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process." *Id.* ¶ 3, App. 52a.

To accomplish this end, the rules imposed a "basic obligation" that broadcasters "widely disseminate information concerning each full-time job vacancy" because "repeated hiring without broad outreach may unfairly exclude minority and women job candidates." *Id.* ¶¶ 3, 78, App. 52a, 113a.

Nonetheless, the FCC made clear that it was not requiring broadcasters to engage in "targeted" recruiting of women and minorities. R&O ¶ 77, App. 113a. Instead, licensees were required to choose one of two "Supplemental Recruitment Measures." *Id.* ¶ 78, App. 114a. The first supplemental recruitment option ("Option A") requires licensees to undertake either two or four (depending on the number of individuals the licensee employs) recruiting outreach initiatives every two years from a list of thirteen possible choices. See 47 C.F.R. § 73.2080(c)(2), App. 39a–40a; R&O ¶¶ 101–02, App. 130a–132a. Those choices include, among others: participating in job fairs; listing job openings "in a job bank or newsletter of a media trade group whose membership includes substantial participation of women and minorities"; and establishing an internship program. Although broadcasters that select Option A must maintain (but not routinely file) records documenting compliance with the rules, they are not required to maintain data concerning the race, ethnicity, or gender of applicants, persons interviewed, or individuals actually hired following these outreach efforts. R&O ¶¶ 78, 111–13, 116–18, App. 113a–116a, 137a–142a,

Broadcasters that choose not to undertake the enumerated supplemental recruitment measures of Option A can select "Option B" and "design their own outreach program to suit their needs, as long as they can demonstrate that their program is inclusive, *i.e*, that it widely disseminates job vacancies throughout the local community." R&O ¶ 104, App. 133a.[6] A broadcaster that chooses Option B must annually place in the

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[6] The Commission enacted Option B at the urging of, among others, the Virginia and North Carolina Associations of Broadcasters, R&O ¶ 104 & n.180, App. 133a-134a, "to accord broadcasters flexibility in designing outreach programs that are tailored to the needs of their station and community." *Id.* ¶77, App. 113a. These associations were among those that then challenged Option A and Option B before the court of appeals.

station's public file a report containing the recruitment source, race, gender and national origin for each job applicant. *Id.* ¶ 78, App. 113a–116a. The Commission emphasized that, although applicant pool data "will be one pertinent source of information," any final decision as to compliance by broadcasters who select Option B would not be made "on statistical records alone," and would "not consider the extent to which minorities and women were actually hired." *Id.* ¶ 115, App. 139a–140a. The Commission also emphasized that it "may ultimately determine that outreach efforts [under Option B] are reasonably designed to reach the entire community, even if few females or minorities actually apply for openings." *Id.* at ¶ 120, App. 142a–143a.

4. The Panel Decision Below. Prior to any implementation of the FCC's new EEO rules, state broadcasters associations (the "Broadcasters") challenged the rules on their face on statutory and constitutional grounds. The court of appeals rejected the Broadcasters' statutory challenges, concluding that the rules are adequately justified by the FCC's intention to "prevent invidious discrimination," and because the rules do not "arbitrarily and capriciously increase[] the 'regulatory burden' on stations." *MD/DC/DE Broadcasters Ass'n* v. *FCC*, 236 F.3d 13, 18 (D.C. Cir. 2001), App. 7a–8a.[7] The panel also rejected the challenge to Option A, stating that it does not "meaningfully pressure" broadcasters to recruit women and minorities. *Id.* at 18–19, App. 9a–10a.

The court of appeals, however, concluded that Option B "does create pressure to focus recruiting efforts upon women and minorities in order to induce more applications from those groups." *Id.* at 19, App. 10a. The panel found this "pressure"

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[7] The panel held that a separate petition for review filed by the Office of Communication, Inc., United Church of Christ ("UCC") was moot in light of its holdings on the Broadcasters' petition for review. App. 19a.

solely from its interpretation of the FCC's proposed enforcement of the rules. The court of appeals maintained that "[u]nder Option B the Commission promises to investigate any licensee that reports 'few or no' applications from women or minorities." *Id.*

The court of appeals then held that this perceived "preferential recruiting" is subject to strict equal protection scrutiny per *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), because it believed that Option B

> "compel[s] broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates. As a result, some prospective nonminority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." App. 13a–14a.

The panel cited as an example of this redirection of resources that a broadcaster might shift from purchasing an advertisement in "the local newspaper" to a smaller advertisement in that newspaper and an advertisement "in a publication targeted at minorities." 236 F.3d at 21 n.***, App. 14a. The court of appeals identified no record support for its analysis of the potential impact of the rules.

The court of appeals then held that the rules do not withstand strict scrutiny because they are not narrowly tailored. The panel so held for two reasons. First, the panel reiterated its previous conclusion that "Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated." *Id.* at 21, App. 15a–16a. The panel also concluded that Option B's data submission requirement is "not probative on the question of a licensee's efforts to achieve 'broad outreach.'" *Id.* at 22, App. 16a–17a.

Finally, the court of appeals refused to sever Option B from the remainder of the rules because, despite the Commission's stated intention that the rules "be treated as severable," the "core of the rule * * * is to provide broadcasters with two alternatives" and "the court cannot by severing one alternative make the other mandatory." *Id.*, App. 17a–18a. Therefore, the panel vacated the rules in their entirety. *Id.* at 23, App. 18a–19a.

5. Petitions For Rehearing or Rehearing *En Banc*. The FCC sought rehearing of the court of appeals' decision concerning the severability of Option B, while intervenors below petitioned for rehearing or rehearing *en banc* concerning the panel's equal protection analysis.[8] The panel denied rehearing, and a five-judge majority of the D.C. Circuit rejected the petitions for rehearing *en banc*.

Three judges dissented from the denial of *en banc* review, and would have granted rehearing on both the equal protection and severability questions. *MD/DC/DE Broadcasters* Ass'n v. *FCC*, 253 F.3d 732, 736, 739 (D.C. Cir. 2001) (Tatel, J., dissenting from denial of rehearing *en banc*), App. 27a, 32a. Citing *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), the dissent noted that the panel had struck down the FCC's EEO rules based on a facial challenge. The dissent then explained that the panel had improperly concluded that "Option B could not be applied without harming white males." 253 F.3d at 736, App. 27a. In the dissenters' view, Option B "merely requires outreach to the entire community, and broadcasters can accomplish such outreach without reducing their recruitment of white males." *Id.* at 737, App. 28a. A broadcaster that conducts outreach in the form of "advertising in a local

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[8] The UCC also sought rehearing on, among other issues, the panel's decision to strike down the EEO rules based on a facial challenge. UCC Petition for Rehearing or Rehearing *En Banc* at 18–19.

newspaper" would therefore "satisfy [the] obligation simply by undertaking broad, non-racially-targeted recruiting." *Id.* at 738, App. 29a. Therefore, the dissent concluded that "there exist 'circumstances . . . under which' broadcasters can comply with Option B with no adverse effect on white males" and that "the broadcasters' facial challenge should have failed." *Id.* (citing *Salerno*, 481 U.S. at 745).

The dissenters also focused on the panel's unsupported conclusion that Option B "pressures" broadcasters to make recruiting decisions on the basis of race. The dissent explained that, despite the panel's statement to the contrary, "[t]he Commission never 'promise[d]' to investigate licensees that report few or no applications from women or minorities" and the panel's "speculation that some broadcasters, imagining pressure from the Commission or misreading the agency's intentions, might go beyond what Option B requires is no reason to declare it facially unconstitutional." *Id.* at 738–39, App. 31a.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision to strike down the FCC's EEO rules based on a facial challenge disregarded this Court's standards for evaluating facial challenges. The facial challenge standards protect statutes and regulations from attack on the basis of speculation about their hypothetical effect. In ignoring these standards, the court of appeals failed to give proper deference to the manner in which the FCC proposed to implement the EEO rules, and reached its conclusions that broadcasters would diminish their recruitment of white males in an effort to comply with the rules without the support of *any* record evidence. This failure to credit the FCC's express representations regarding its plans for implementing the rules fundamentally undercuts the FCC's ability to interpret its own regulations, in violation of this Court's holdings that courts should defer to agency interpretations of their regulations.

Further, certiorari is warranted because the court of appeals' decision to strike down the FCC regulations on their face also has the effect of overturning *sub silentio* federal statutes requiring the FCC to maintain and enforce EEO programs in the broadcast and cable industries. Review is also appropriate because the issues presented by this case are related to issues before this Court in *Adarand Constructors, Inc.* v. *Mineta*, No. 00-730.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S STANDARDS FOR EVALUATING FACIAL CHALLENGES.

Failing to properly apply this Court's standards for the review of facial challenges, the court of appeals struck down the FCC's new EEO rules by surmising that the FCC would enforce the rules in an unconstitutional manner. Thus, instead of properly ascertaining whether the FCC was likely to apply the rules constitutionally, or determining that there was no possible way to do so, or waiting for an as applied challenge showing enforcement that raises constitutional questions, the court of appeals improperly relied on an improbable scenario in which the FCC would "pressure" broadcasters to make recruiting decisions on the basis of race and deny information about job opportunities to non-minority males. The lower court's conclusions were not grounded in *any* record evidence and conflicted with the FCC's proposed implementation of the rules. The court of appeals therefore turned the facial challenge inquiry on its head.

By ignoring the standards that this Court has set forth for the conduct of facial challenges, the court of appeals effectively held that courts have unlimited authority to strike down agency regulations based on facial challenges so long as the court can envision a scenario, however unlikely, in which the regulations might be implemented improperly. Because that holding

fundamentally threatens the ability of administrative agencies to enact regulations that satisfy constitutional scrutiny, especially in the important area of equal employment opportunity, this issue warrants review by this Court.

A. This Court Has Imposed A High Threshold For Sustaining A Facial Challenge.

The EEO rules cannot be nullified on their face merely because the FCC *might* apply them in an unconstitutional manner. To the contrary, "[t]he fact that the [law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).[9]

It is likewise improper for a court to "invalidate[] [a] statute on a facial challenge based upon a worst-case analysis that may never occur." *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990). Moreover, potential difficulties in the administration of a neutral law are "no[t] well suited to consideration on a facial challenge." *Hill* v. *Colorado*, 530 U.S. 703, 740 (2000) (Souter, J., concurring).

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[9] Although the precise formulation of the facial challenge standard is a matter of some dispute, in the present case, the facial constitutionality of the FCC's EEO rules does not depend upon the language of any particular test, because the rules satisfy each such standard that this Court has previously identified. *E.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973) (facial challenge to statute on First Amendment overbreadth grounds must establish that the invalid application of a statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep"); *Salerno*, 481 U.S. at 745 (facial challenge to Bail Reform Act must establish that "no set of circumstances exists under which the Act would be valid"); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 895 (1992) (reproductive rights decision held that a statute is facially invalid if it is a "substantial obstacle" to exercise of right in a "large fraction" of cases); *INS* v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) ("That the regulation may be invalid as applied in [some] cases, * * * does not mean that the regulation is facially invalid.").

The high threshold for facial challenges grows out of "the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court," which facial challenges do not. *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). Therefore, this Court has employed facial challenges "'sparingly and only as a last resort,'" and noted that such challenges "confront 'a heavy burden'" and are "'generally disfavored.'" *NEA* v. *Finley*, 524 U.S. 569, 580 (1998) (citations omitted).

B. The Court of Appeals Ignored This Court's Facial Challenge Jurisprudence and Improperly Found the EEO Rules Facially Unconstitutional Based on Speculative Conclusions That the Rules Would Be Implemented Contrary To the FCC's Report and Order.

The court of appeals' decision conflicts with this Court's facial challenge standards, which the panel never even addressed. Instead, the court below did precisely what this Court's jurisprudence forbids: it imagined a worst-case scenario, and struck down the rules because it assumed that broadcasters would feel "pressured" by the regulations to target their recruiting towards women and minorities. The panel hypothesized that this pressure would deprive non-minority men of information about job openings that they would otherwise have received. This reliance on a hypothetical worst-case scenario jeopardizes the presumption of constitutionality of virtually all regulations that arguably present constitutional issues. Under the panel's decision, challengers could have regulations struck down merely by arguing (without any evidence) that an agency might implement the regulation improperly, even though the agency states that it plans to implement the regulations in a contrary and wholly permissible manner. Certiorari should be granted to address this important issue.

1. The Court of Appeals' Conclusion That Option B Would "Pressure" Licensees to Recruit Minorities and Women Is At Odds With the Manner in Which the FCC Plans To Implement That Option.

The court of appeals first exceeded the scope of a proper facial challenge when it concluded that FCC would "pressure" broadcasters to recruit on the basis of race. The lower court reasoned that the FCC's collection of applicant pool data to ensure compliance with Option B would exert such pressure, because it concluded that the Commission "promises to investigate any licensee that reports 'few or no' applications from women or minorities." 236 F.3d at 19, App. 11a. The court viewed such data collection as permitting inappropriate reliance by the FCC on the composition of application pools, because "[a] regulatory agency *may* be able to put pressure upon a regulated firm in a number of ways, some more subtle than others." *Id.*, App. 10a (emphasis added).

The panel's reasoning completely disregarded the FCC's explanation of Option B. In fact, the FCC never stated that it would single out for enforcement actions licensees that select Option B and report "few or no" women and minorities in their applicant pools. To the contrary, the FCC said that it would evaluate the outreach programs of *every* licensee that chooses Option B to determine whether that licensee has engaged in broad outreach. R&O ¶ 115, App. 139a–140a.

In addition, despite the panel's conclusion to the contrary, the FCC stated in no uncertain terms that it was *not* requiring licensees to engage in targeted recruiting. See R&O ¶ 77, App. 113a ("the objective of ensuring that minority and female applicants have the opportunity to apply for positions in the broadcast industry may be achieved without a specific requirement that broadcasters * * * use recruitment methods that specifically target those groups"). A broadcaster that

misinterprets the FCC's statement that Option B does not require it to conduct targeted recruiting to mean that it must conduct targeted recruiting does so on its own accord, not by government mandate. See *Broadcasters*, 253 F.3d at 739, App. 31a–32a (Tatel, J., dissenting from denial of rehearing *en banc*).[10]

Furthermore, the FCC made clear that the applicant pool data required under Option B would be used for a limited purpose: evaluating "whether the [recruiting outreach] program is effective in reaching the entire community." R&O ¶ 104, App. 133a–134a. The FCC plainly was not creating incentives for licensees to engage in race-based recruiting under Option B. For example, in paragraph 120 of its Report and Order, the Commission detailed the manner in which it planned to use the application pool data to evaluate Option B recruiting programs. Paragraph 120 reads:

> "[T]here is no requirement that the composition of applicant pools be proportionate to the composition of the local work force. However, few or no females or minorities in a broadcaster's applicant pools may be one indication (and only one indication) that the station's outreach efforts are not reaching the entire community. * * * *We may ultimately determine that outreach efforts are reasonably designed to reach the entire community, even if few females or minorities actually apply for*

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[10] The FCC has made clear that racial discrimination in employment by broadcasters is unacceptable. *E.g.*, *Applications of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia*, 95 F.C.C.2d 1, 9 (1983) (in rejecting licensee proposal to replace white receptionist when qualified black receptionist was found, Commission noted that "particular positions are not to be set aside for any reason that would suggest discrimination"); *Bennett Gilbert Gaines*, 10 F.C.C. Rcd. 6589, 6593 (Admin. L.J. 1995) (reserving vacancies for minorities was "inconsistent with the Commission's EEO rules").

> *openings. Conversely, the fact that a sizeable number of females or minorities have applied for openings will not necessarily establish the inclusiveness of the station's efforts. Also, we recognize that an employer cannot control who applies for jobs. The only purpose of the data collection is to give the broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community.*" R&O ¶ 120, App. 142a–143a (emphasis added).

Therefore, the FCC told licensees that they gain *no* advantage by making recruiting decisions on the basis of race or sex. Broadcasters will not be deemed in compliance with the obligation to conduct "broad outreach" simply because a large number of women and minorities are included in applicant pools. Conversely, the Commission stated that even a recruitment program that results in few women or minority applicants may nonetheless have satisfied the obligation to conduct broad outreach.[11]

The court of appeals' speculation that the FCC would use applicant pool data in a manner other than that specified is both beyond the scope of a facial challenge and contrary to the record. The panel's rejection of the FCC's interpretation of its

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[11] See also R&O ¶ 115, App. 139a–140a (FCC will look at a range of factors to determine whether Option B recruitment program achieved broad outreach, including, but not limited to, "the reach of the recruitment sources utilized (such as the circulation of media in which vacancies were advertised), whether the broadcaster adequately analyzed the results of its efforts, implemented effective measures to correct any problems, and avoided excessive reliance on word-of-mouth recruitment").

rules both prevents the Commission from determining how it will implement its own regulations, and jeopardizes the ability of any agency to adopt regulations that will survive constitutional scrutiny, as the regulations could be found unconstitutional simply based on speculation by a court that they might be implemented improperly, despite all record evidence to the contrary. This issue goes to the heart of an agency's ability to implement its regulations, and therefore warrants review by this Court.

2. The Court of Appeals' Conclusion that the EEO Rules Would Harm Non–Minorities Was Based on Speculation Not Supported By the Record Before the FCC.

The court of appeals further departed from this Court's facial challenge standards when it concluded that broadcasters would necessarily implement the rules to deprive non-minority males of information about job openings that they would have received absent the rules. This conclusion puts in constitutional jeopardy virtually every agency regulation that a court, on conjecture alone, determines might have unintended consequences when implemented.

The court of appeals concluded that the EEO rules could not be implemented in a constitutional manner because

> "[u]nder Option B the Commission has compelled broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates. As a result, some prospective nonminority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." 236 F.3d at 20–21, App. 13a–14a (footnote omitted).

The court of appeals continued:

> "If an employer believed that it could reach the maximum number of good prospects with a display ad in the local newspaper, but they would likely be non-minorities, then it nonetheless would choose to run a smaller newspaper ad and use its remaining funds to run an ad in a publication targeted at minorities." *Id.* at 21 n.***, App. 14a.

These conclusions—which were not supported in any respect by the record—plainly conflict with the proper standards for evaluating facial challenges. First, the FCC has not "compelled broadcasters to redirect their necessarily finite recruiting resources." Nothing in the administrative record suggests that a licensee who selects Option B would have to diminish its recruitment of non-minorities to comply.

The court of appeals' conclusion also assumes, without evidence, that broad recruiting outreach is a "zero sum" practice, such that any effort to ensure that minorities learn of employment opportunities will inevitably deprive non-minorities of information. Licensees, however, could just as likely accomplish broad outreach to all sectors of the community without depriving anyone of information on the basis of their race. See 253 F.3d at 739, App. 32a (Tatel, J., dissenting from denial of rehearing *en banc*) ("Even assuming, as the panel speculated, that recruiting budgets are 'fixed in the short run,' there is no reason to believe that broadcasters would not reallocate recruiting expenditures without depriving nonminorities of job information.") (citation omitted). The Commission viewed with favor recruitment methods such as "e-mail and fax [that] make the notification of a large number of sources less burdensome." R&O ¶ 92, App. 125a. It costs little or nothing to add additional recipients to fax or e-mail distribution lists.

The panel's hypothetical that broadcasters would implement Option B by placing small ads in two newspapers rather than one larger one in "the local newspaper" is similarly without record support. 236 F.3d at 21 n.***, App. 14a. Furthermore, the hypothetical erroneously assumes that the "local" newspaper is one read only by white males, while other newspapers are read only by minorities and women.

In addition, the lower court inappropriately speculated that individuals who would have learned about job opportunities absent Option B will be deprived of that knowledge under Option B. The Broadcasters presented no evidence on this point to the Commission, and indeed never made this argument to the panel. Further, it is just as likely, if not more likely, that a recruitment program that achieves "broad outreach" will reach *more* white males than a program that does not do so. *Broadcasters*, 253 F.3d at 738 (Tatel, J. dissenting from denial of rehearing *en banc*), App. 29a.

In short, the court of appeals' decision simply assumes that Option B would make non-minorities into victims of discrimination without evidence to support that conclusion. In fact, although the FCC has enforced EEO requirements for over thirty years, the record contains no evidence of even one complaint of reverse discrimination by a broadcaster or a job applicant. This speculation about the effects of Option B plainly was inappropriate in the context of a facial challenge, and threatens the ability of any regulation to satisfy constitutional scrutiny if there is any chance that the agency might implement it improperly. This issue warrants review by this Court.

3. Option B's Data Collection Requirement Does Not Render It Facially Unconstitutional.

It is also important that the Court grant certiorari to ensure that lower federal courts do not strike down facially neutral regulations requiring the collection and reporting of race and

gender data merely because one might imagine a scenario in which the data might be used improperly. The panel struck down Option B because it concluded that the collection of applicant pool data would "subtl[y]" pressure broadcasters to target their recruiting towards minorities and women. 236 F.3d at 19, App. 10a. Never before has a federal appeals court raised such serious questions about the constitutional infirmities of race and gender data collection without any record evidence that the data were or would be used improperly.

The importance of race and gender data collection is reflected by the widespread collection of such data by government agencies. For example, the EEOC has adopted regulations under Title VII of the 1964 Civil Rights Act requiring employers to report the race of employees. 29 C.F.R. § 1602.7.[12] There is little dispute that race and gender data

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[12] See also, *e.g.*, Jury Selection and Service Act of 1968, 28 U.S.C. § 1869(h) (requires federal government to "elicit" the race of all individuals considered for jury duty); 7 C.F.R. § 1944.266(d)(3) (Department of Agriculture grant recipients "must maintain current data on the race, ethnicity and gender of program applicants and beneficiaries."); 10 C.F.R. § 1040.102(b) (recipients of assistance from Department of Energy must make available "data on program participants, identified by race, color, national origin, sex, age and handicap status"); 12 C.F.R. § 203.4(b) (banks must collect "data about the race or national origin and sex" of home loan applicants); 23 C.F.R. § 200.9(b)(4) (state highway agency compliance with Title VI requires "collection of statistical data (race, color, religion, sex, and national origin) of participants in, and beneficiaries of State highway programs"); 24 C.F.R § 107.30(b) (lenders participating in HUD mortgage insurance programs must "maintain data regarding the race, religion, national origin and sex of each applicant * * * for assistance"); 41 C.F.R. § 60-1.12(c) (Office of Federal Contract Compliance Programs requires Government contractors, depending on their size, to document "(i) [t]he gender, race, and ethnicity of each employee; and (ii) where possible, the gender, race, and ethnicity of each applicant."); 41 C.F.R. § 60-2.11–2.16 (requiring qualifying nonconstruction government contractors to develop written analysis of their workforces by race, gender, and ethnicity and compare the representation of women and minorities with the availability of

collection is necessary for the government to identify and remedy discrimination. See *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 80–81 (1984) (Title VII data submission helps the EEOC to "identify and eliminate systemic employment discrimination"); see also Brief for the Respondents [United States] in *Adarand Constructors, Inc.* v. *Mineta*, No. 00-730, at 46 ("the government has a responsibility to identify and remedy racial discrimination" and the government "could not discharge that duty without using race-conscious mechanisms for identifying whether racial discrimination exists").

If the FCC uses the applicant pool data improperly, any broadcaster can challenge that improper application of the rules. See 253 F.3d at 738 (Tatel, J., dissenting from denial of rehearing *en banc*), App. 29a. Such an as applied challenge would both protect the interests of broadcasters and insulate the rules from challenge based on speculation about how the Commission *might* implement them. *Cf. United States* v. *New Hampshire*, 539 F.2d 277, 280 (1st Cir. 1976) (Title VII data collection regulations are constitutional because "[s]tatistical information as such is a rather neutral entity which only becomes meaningful when it is interpreted. And any positive steps which the United States might subsequently take as a result of its interpretation of the data in question remain subject to law and judicial scrutiny.").

In short, the court of appeals' decision to strike down the rules on their face based on speculation about FCC enforcement and misuse of statistical data therefore deprives the FCC of the chance to appropriately implement the rules. It also threatens any agency's ability to craft similar data collection rules in the future that can withstand a facial challenge. Because of the potential broad–ranging impact that the court of appeals'

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qualified women and minorities in the "reasonable recruitment area").

decision will have on future agency rule making and data collection, the decision below warrants review by this Court.

II. THE COURT OF APPEALS DEPRIVED FCC AND OTHER AGENCY REGULATIONS OF THE PRESUMPTION OF CONSTITUTIONALITY.

The court of appeals' decision puts in jeopardy any agency rule that a court concludes might be implemented improperly. When a court, weighing a facial constitutional challenge to regulations, disregards or discredits numerous material representations made by the government in an official order, it is difficult to see how any agency regulations on a subject touching the Constitution can survive judicial review. This issue, which goes to the heart of the ability of administrative agencies to enact and enforce regulations, also warrants review by this Court.

The court of appeals' failure to credit the statements in the Report and Order about how the FCC would implement the rules inappropriately failed to defer to the FCC's interpretation of its regulations. This Court, however, has held that "substantial deference" should be given "to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). That interpretation should be afforded "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Moreover, in interpreting a regulation based on a facial challenge, "[t]hat the regulation may be invalid as applied in [some] cases, however, does not mean that the regulation is facially invalid." *INS* v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991).

The court of appeals clearly ignored these standards for the appropriate deference due to an administrative agency. For example, the court of appeals thought the rules might be capable of unconstitutional application by causing broadcasters

to alter their newspaper advertising. 236 F.3d at 21 n.***, App. 14a. But there was no record support for this hypothetical. The court of appeals also refused to sever Option B from the remainder of the rules, despite recognizing that the FCC intended that the rules "be treated as severable." 232 F.3d at 22, App. 17a; see also 253 F.3d at 734, App. 22a. Moreover, the panel ignored the FCC's plain statements that it is not requiring targeted recruitment, and concluded, without reliance on evidence, that broadcasters would respond to the rules by conducting recruiting targeted towards particular groups. See R&O ¶ 77, App. 113a.

The court of appeals' decision therefore cast doubt upon the ability of administrative agencies to interpret their regulations, and to determine how they will implement those regulations. Because of the wide-ranging consequences this decision has for both FCC regulations and other agency regulations, this issue warrants review by this Court.

III. THE COURT OF APPEALS HAS, *SUB SILENTIO*, STRUCK DOWN ACTS OF CONGRESS THAT MANDATED THE FCC'S EEO RULES.

Review by this Court is also warranted because in finding the FCC's EEO rules unconstitutional, the court of appeals effectively struck down provisions of the Communications Act of 1934, as amended, which directed the FCC not to modify its EEO rules for television stations and to adopt EEO rules for cable, without even acknowledging that effect of its decision. A lower court's decision to hold a federal statute unconstitutional raises a question of obvious importance. *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling

an Act of Congress.").[13] Review is especially warranted in this case because the court of appeals failed to acknowledge or even consider that its decision in effect invalidated a federal statute.

Section 334(a) of the Communications Act, enacted in 1992, explicitly prohibited the FCC from revising:

> "(1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or
>
> (2) the forms used by such licensees and permittees to report pertinent employment data to the Commission." 47 U.S.C. § 334(a), App. 279a.

The Conference Report accompanying this provision stated that it "codifie[d]" the FCC's EEO rules for television licensees, and that Congress intended that "this statutory provision be applied in the same manner as were the existing rules." H.R. Conf. Rep. No. 102-862, at 97 (1992).

The EEO rules codified by section 334(a) required each broadcast station to establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice." 47 C.F.R. § 73.2080(b) (1992), App. 281a. Of particular relevance here, Form 396, adopted pursuant to the rules, required each station to report the sources that it used to attract qualified minority and female applicants and the number of referrals from each source. Form 396, Part III. The rule and

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[13] When Congress codifies regulations and requires a federal agency to enforce them, the regulations take on the imprimatur of a direct congressional enactment, and their invalidation should be treated as though the court held a statute unconstitutional. See *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947) (regulatory definitions drafted by government agency acting under Congressional authority have the same effect "as if they had been enacted by Congress directly").

associated forms also required each station to report the race and gender of its employees according to job category and to evaluate its employment profile against the availability of minorities and women in the recruitment area. 47 C.F.R. § 73.2080(c)(3) (1992), App. 283a–284a; Form 395; Form 396, Part VI.

In enacting section 334, Congress was well aware of these provisions in the FCC's former rules. The Conference Report stated that "[i]t is the intent of the conferrees that [FCC Forms 395 and 396] continue to be filed with the FCC." H.R. Conf. Rep. No. 102-862, at 97. The Report added that the FCC should "compare the workforce data" submitted in the forms "with the station's area labor force." *Id.*

Despite this Congressional ratification, the court of appeals in *Lutheran Church* struck down the FCC's former EEO rules on the ground that the required comparison between a broadcaster's employees and the composition of the local population was unconstitutional. 141 F.3d at 352. In response, the FCC drafted the new EEO rules to eliminate the provisions found objectionable in *Lutheran Church*, focusing on broad outreach to ensure equal opportunities. Yet, the court of appeals found reporting requirements necessary to monitor the effectiveness of those rules unconstitutional and struck down the entire rule.

Thus, the court of appeals' decision has left the FCC unable to comply with section 334 of the Communications Act. Contrary to Congress' plain language and intent, the FCC was required by *Lutheran Church* to revise its 1992 EEO rules and the associated forms as applied to television licensees. Furthermore, under the decision at issue here, the court of appeals has acted so as to prevent the FCC from collecting *any* data regarding the race and gender of job applicants necessary to monitor licensee compliance, even though Congress, in

enacting section 334, expressly approved of the Commission's collection of such data.

Moreover, the decision below also effectively renders unconstitutional EEO requirements for cable television systems set forth in section 634 of the Communications Act, 47 U.S.C. § 554, App. 286a, even though no party to this litigation challenged either section 634 or the FCC rules implementing it. Section 634 directs the FCC to adopt rules for cable operators that contain provisions virtually identical to those in the broadcasters' EEO rules. Following the decision below, the FCC acknowledged that it could no longer enforce its cable EEO rules after the court below struck down its broadcast EEO rules. *Suspension of the Broadcast & Cable Equal Employment Opportunity Outreach Program Requirements*, 16 F.C.C. Rcd. 2872 (2001).

In short, the decision of the court of appeals not only ran roughshod over the expressed intentions of the Federal Communications Commission, but it also ignored the express intention of Congress when it ratified the FCC's EEO rules. This disregard for statutes mandating the EEO rules is another reason why the Court should grant certiorari to review the decision below.

IV. THE ISSUES IN THIS CASE ARE RELATED TO ISSUES IN *ADARAND CONSTRUCTORS, INC.* V. *MINETA*.

As explained above, this case presents important questions about the constitutionality of programs adopted by the federal government to guarantee equal opportunity. This Court has already decided to hear argument during this Term in another case that presents a related question. This Court will shortly consider the constitutionality of the Department of Transportation's revised Disadvantaged Business Enterprise program in *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. granted sub nom. Adarand Constructors,*

Inc. v. *Mineta,* 121 S. Ct. 1401 (2001). This Court granted the petition for a writ of certiorari therein on the questions of (1) "Whether the court of appeals misapplied the strict scrutiny standard * * * " and (2) "Whether [the DOT's DBE] program is narrowly tailored to serve a compelling governmental interest." 121 S. Ct. 1598 (2001).

This Court's facial challenge jurisprudence will likely influence the decision in *Adarand.* The petitioners in *Adarand* are challenging the constitutionality of the Department of Transportation's program on its face. For that reason, the brief for the United States relies on decisions of this Court to defend the facial constitutionality of the Department of Transportation's program. *Brief for the Respondents* (in *Adarand*) at 19–20. Moreover, this Court's decision in *Adarand* will likely shed light on the kinds of programs and nature of the justifications that the federal government can use to guarantee equal opportunity.

Also at issue in *Adarand* is the proper standard for determining whether a program is "narrowly tailored" to serve a compelling governmental interest. In this case the court of appeals struck down the rules based on its view of the standards for "narrow tailoring." 236 F.3d at 21–22, App. 15a–17a. Any modification or refinement of those standards in *Adarand* will obviously impact the resolution of this case.

Review of the court of appeals' decision is therefore warranted because it would complement this Court's deliberations in *Adarand.* If the Court concludes that the issues in *Adarand* can be resolved adequately without reviewing this case, and that review of this case is not warranted independently, this petition should be held pending the Court's disposition of *Adarand* and then dealt with consistently thereafter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 17, 2001

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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL ET AL.,

Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1094, Consolidated with 00-1198

MD/DC/DE BROADCASTERS ASSOCIATION, ET AL.,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, ET AL.,

INTERVENORS.

September 29, 2000, Argued

January 16, 2001, Decided

On Petitions for Review of an Order of the Federal Communications Commission.

Barry H. Gottfried argued the cause for petitioners State Broadcasters Associations. With him on the briefs were Richard R. Zaragoza and Kathryn R. Schmeltzer. David D. Oxenford, Jr. entered an appearance.

Shelby D. Green argued the cause and filed the briefs for petitioner Office of Communication, Inc., United Church of Christ.

Christopher J. Wright, General Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were Daniel M. Armstrong, Associate General Counsel, C. Grey Pash, Jr., Counsel, Bill L. Lee, Assistant Attorney General, U.S. Department of Justice, and Lisa W. Edwards, Attorney.

David Earl Honig, Elliot M. Mincberg, Frederick C. Schafrick and Thomas J. Mikula were on the brief for intervenors Minority Media and Telecommunications Council, et al.

Angela J. Campbell was on the brief for intervenor National Organization for Women, et al.

Tom W. Davidson, Daniel L. Brenner, Neal M. Goldberg, Michael S. Schooler, David L. Nicoll, Dominique T. Bravo, Richard B. Nettler and Charles A. Hunnicutt were on the brief for amici curiae Radio One, Inc. et al. Thomas P. Powers and Anthony T. Pierce entered appearances.

Julie Nepveu and Theodore C. Whitehouse were on the brief for amici curiae The Leadership Conference on Civil Rights and National Council of the Churches of Christ. Andrew J. Schwartzman entered an appearance.

Christopher M. Curran and Eduardo Pena were on the brief for amicus curiae Congressional Black Caucus.

Before: GINSBURG, SENTELLE and HENDERSON, Circuit Judges. Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

Fifty state broadcasters associations (Broadcasters) petition for review of an Equal Employment Opportunity (EEO) rule promulgated by the Federal Communications Commission. The Broadcasters argue that the rule violates: (1) the Administrative Procedure Act by creating an arbitrary and capricious reporting burden; and (2) the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution of the United States by granting preferences to women and minorities. The United Church of Christ (UCC) petitions for review of the same EEO rule, arguing that it violates the APA because, without giving a reasoned explanation, the agency changed its policy of requiring broadcasters to recruit women and minorities.

We hold first that the Broadcasters fail to substantiate their claim that the rule is arbitrary and capricious. We further hold that the rule does put official pressure upon broadcasters to recruit minority candidates, thus creating a race-based classification that is not narrowly tailored to support a compelling governmental interest and is therefore unconstitutional. Because we find that the unconstitutional portion of the rule is not severable, we vacate the rule in its entirety and dismiss the petition of the UCC as moot.

I. Background

The Federal Communications Commission draws its authority to issue EEO rules from the Communications Act of 1934, 47 U.S.C. § 151 et seq., which authorizes the Commission, in considering whether to grant a license or renewal to a broadcast station, to determine "whether the public interest, convenience, and necessity will be served by the granting of such application." *Id.* at § 309(a). In 1969 the Commission determined that it would not serve the public interest to grant licenses to broadcasters with discriminatory hiring practices. The Commission therefore prohibited licensees from discriminating in employment on the basis of race or sex

and required them to establish EEO programs. See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240 (1969). In 1992 the Congress prohibited the Commission from "revising ... the regulations concerning equal employment opportunity ... as such regulations apply to television broadcast station licensees." 47 U.S.C. § 334(a)(1).

The regulations then in effect required all broadcast licensees -- both radio and television stations -- not only to refrain from invidious discrimination but also to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice." 47 C.F.R. § 73.2080(b). The regulations required stations to seek out sources likely to refer female and minority applicants for employment, to track the source of each referral, and to record the race and sex of each applicant and of each person hired. If these data indicated that a station employed a lower percentage of women and minorities than were employed in the local workforce, then the Commission would take that into account in determining whether to renew the station's license.

In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), we held that the Commission's EEO rule was an unconstitutional race-based classification. (The question whether the rule was an unconstitutional sex-based classification was not before the court.) We held first that the rule was subject to strict constitutional scrutiny because it was "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional [racial] representation" and "obliged stations to grant some degree of preference to minorities in hiring." *Id.* at 352-53. We further held that the Commission's sole rationale for its rule, promoting "diversity of programming," was not a compelling

governmental justification; the Commission had expressly abjured preventing employment discrimination as a goal of its EEO regulation. *Id.* at 354-55. Accordingly, we remanded the matter to the Commission to determine whether it had a compelling governmental interest (such as the Justice Department had urged as an amicus curiae, in preventing discrimination) to support its regulation of employment practices in the broadcast industry. *Id.* at 356.

On remand, the Commission suspended the EEO rule in its entirety and issued a Notice of Proposed Rulemaking soliciting comments on a draft replacement rule. Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies, 13 FCC Rcd 23004 (1999). Following the comment period the Commission concluded that word-of-mouth recruiting was the single greatest barrier to equal employment in the broadcast industry because it tends to replicate the current composition of the workforce. Accordingly, the Commission issued a new EEO rule requiring licensees to achieve a "broad outreach" in their recruiting efforts. Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies, 15 FCC Rcd 2329, P 3 (2000) (R&O). To this end, the new EEO rule states that a licensee must make a good faith effort to disseminate widely any information about job openings and, in order to "afford[ ] broadcasters flexibility in designing their EEO programs," the rule allows them to select either of two options entailing "supplemental measures" for accomplishing that goal. R&O at ¶ 78. Under Option A the licensee (if it has more than ten employees) must undertake four approved recruitment initiatives in each two-year period; qualifying initiatives are specified by the Commission in some detail, as can be seen

from the list reproduced in the margin.* A licensee that selects Option A need not report the race and sex of job applicants.

---

* (i) Participation in at least four job fairs ...;

(ii) Hosting of at least one job fair;

(iii) Co-sponsoring at least one job fair with organizations ... whose membership includes substantial participation of women and minorities;

(iv) Participation in at least four events sponsored by organizations representing groups ... interested in broadcast employment ...;

(v) Establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment;

(vi) Participation in job banks, internet programs, and other programs designed to promote outreach generally ...;

(vii) Participation in scholarship programs designed to assist students interested in pursuing a career in broadcasting;

(viii) Establishment of training programs designed to enable station personnel to acquire skills that could qualify them for higher level positions;

(ix) Establishment of a mentoring program for station personnel;

(x) Participation in at least four events or programs sponsored by educational institutions relating to career opportunities in broadcasting;

(xi) Sponsorship of at least two events ... designed to inform and educate members of the public as to employment opportunities in broadcasting;

(xii) Listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities;

(xiii) Participation in other activities ... reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities.

47 C.F.R. § 2080(c)(2).

Under Option B the licensee may design its own outreach program but must report the race and sex of each job applicant and the source by which the applicant was referred to the station. *See* 47 C.F.R. § 73.2080(d).

In addition, the new EEO rule reinstates the requirement that each licensee file an Annual Employment Report. *See* 47 C.F.R. § 73.2080(i). That report, the filing of which the Commission had suspended following the decision in Lutheran Church, requires the station to identify each employee by race and sex. The Commission stated that it would use the data from the Annual Employment Reports only to monitor industry trends and not (as it had under the prior EEO rule) to screen renewal applications or to assess a licensee's compliance with its EEO obligations. R&O at ¶¶ 6, 225-226.

The United Church of Christ filed a petition to review the new EEO rule in the Second Circuit. The Broadcasters filed a petition for review in this court. The Second Circuit transferred the UCC's petition here and the two cases were consolidated.

II. Analysis

The Broadcasters argue that the new EEO rule favors women and minorities and, in so doing, is arbitrary and capricious as well as unconstitutional. The UCC argues that the new rule is arbitrary and capricious because the Commission departed, without explanation, from its prior policy of requiring broadcasters to recruit women and minorities.

A. The Broadcasters' statutory claim

The Broadcasters argue the new rule is arbitrary and capricious for two reasons, neither of which is persuasive. The Broadcasters first attack the Commission's claim, in the preamble to the new rule, that the rule will promote "programming diversity," R&O at ¶ 4; they point out that this court questioned the legitimacy of such a goal in *Lutheran*

Church. *See* 141 F.3d at 354 ("We doubt ... that the Constitution permits the government to take account of racially based differences [in tastes or opinions], much less encourage them"). On review, however, the Commission acknowledges the constitutional cloud over "programming diversity" as a justification for making race a consideration in employment and states that its primary and assertedly sufficient goal in issuing the EEO rule was to prevent invidious discrimination. The preamble to the rule supports the Commission's point. *See* R&O at ¶ 4 (noting that nondiscrimination goals "would be sufficient in themselves to warrant" the rule). The Broadcasters' attack on the rule as an effort to promote diversity in programming is beside the point, therefore.

The Broadcasters next contend that the new EEO rule arbitrarily and capriciously increases the "regulatory burden" on stations: Under the old rule "broadcasters filed only nine reports in each eight year license term, while the [new regulations] require broadcast licensees to prepare and file twenty-one reports during a license term." The Broadcasters also argue that the Commission acted arbitrarily and capriciously in eliminating the exemption from filing for stations in areas where minorities are a small percentage of the workforce. In response, the Commission states first that despite the increased number of reports, the time and effort required to complete them has decreased. In their reply the Broadcasters do not disagree and we take the Commission's point as conceded. Second, the Commission reasonably explains that it eliminated the filing exemption in areas with a low percentage of minority group members in the workforce because it no longer takes enforcement action against broadcasters that indicate in their Annual Reports that they have a "low" percentage of minority employees. The Commission's explanation is reasonable; hence the Broadcasters have not shown that the new rule creates an arbitrary and capricious regulatory burden.

B. The Broadcasters' constitutional challenge

The Broadcasters argue next that the new EEO rule puts official pressure on them to favor minorities in the hiring process. This pressure, they claim, violates the Fifth Amendment because it employs a race-based classification that does not withstand strict scrutiny.

1. Does the rule require recruitment or hiring of women and minorities?

The Broadcasters argue that the new EEO rule requires them to recruit and to hire women and minorities. Because we conclude that the rule does create pressure to recruit women and minorities, which pressure ultimately does not withstand constitutional review, we do not reach the question whether the rule creates pressure to hire those women and minorities who are recruited.

For purposes of their constitutional challenge, the Broadcasters focus upon application of the EEO rule to minorities. The Broadcasters argue that both Option A and Option B of the new rule pressure them to recruit minorities. In fact, however, only Option B actually seems to create such pressure. Under Option A, a licensee is not required to report the race or sex of job applicants or interviewees. Instead, the licensee selects from a list of 13 types of recruitment measures, only two of which pay special attention to women and minorities. (Those two measures provide that a licensee may "co-sponsor[ ] at least one job fair with," or list "each upper-level category opening in a job bank or newsletter of," organizations "whose membership includes substantial participation of women and minorities." 47 C.F.R. § 73.2080(c)(2)(iii) and (xii)). Because, as the Commission points out, licensees remain free under Option A to select recruitment measures that do not place a special emphasis upon the presence of women and minorities in the target audience, we do

not believe the Broadcasters are meaningfully pressured under Option A to recruit women and minorities.

Option B, however, as FCC Commissioner Furchtgott-Roth pointed out in his dissent from the EEO rule, clearly does create pressure to focus recruiting efforts upon women and minorities in order to induce more applications from those groups. Licensees selecting Option B must report the race, sex, and source of referral for each applicant. *See* 47 C.F.R. § 73.2080(d)(1). The Commission made clear, moreover, in adopting the rule, that "if the data collected does [sic] not confirm that notifications are reaching the entire community, we expect a broadcaster to modify its program as warranted so that it is more inclusive." R&O at ¶ 104. In determining whether recruitment efforts have reached the "entire community," the Commission considers the number of women and minorities in the applicant pool. If a licensee reports "few or no" women and minorities in its applicant pool, then the Commission will investigate the broadcaster's recruitment efforts. Id. at ¶ 120.

A regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others. The Commission in particular has a long history of employing:

> a variety of sub silentio pressures and "raised eyebrow" regulation of program content .... The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry ... all serve as means for communicating official pressures to the licensee.

Community-Service Broadcasting of Mid-America, Inc. v. FCC, 192 U.S. App. D.C. 448, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (en banc); cf. *Writers Guild of America v. FCC*, 609 F.2d 355,

365-66 (9th Cir. 1979) (noting that "the line between permissible regulatory activity and impermissible 'raised eyebrow' harassment of vulnerable licensees is ... exceedingly vague").

Under Option B the Commission promises to investigate any licensee that reports "few or no" applications from women or minorities. Investigation by the licensing authority is a powerful threat, almost guaranteed to induce the desired conduct. *See Chamber of Commerce v. Department of Labor*, 335 U.S. App. D.C. 370, 174 F.3d 206, 210 (D.C. Cir. 1999) (noting that agency "is intentionally using the leverage it has by virtue solely of its power to inspect. The Directive is therefore the practical equivalent of a rule that obliges an employer to comply or to suffer the consequences; the voluntary form of the rule is but a veil for the threat it obscures"); *see also* BARRY COLE & MAL OETTINGER, RELUCTANT REGULATORS 213 (1978) (investigatory hearing before FCC "is considered by both key staff people and most commissioners almost as drastic as taking a license away").

Indeed, the Commission's focus upon the race and sex of applicants belies its statement -- or so a licensee reasonably might (and prudently would) conclude -- that its only goal is that licensees recruit with a "broad outreach." *See Lutheran Church*, 141 F.3d at 353. Were that the Commission's only goal, then it would scrutinize the licensee's outreach efforts, not the job applications those efforts generate. Measuring outputs to determine whether readily measurable inputs were used is more than self-evidently illogical; it is evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them. As a consequence, the threat of being investigated creates an even more powerful incentive for licensees to focus their recruiting

efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications.**

2. The level of scrutiny

With respect to minorities, the Broadcasters argue that the court should give strict constitutional scrutiny to the recruiting requirement. The Commission's position is that, unlike affirmative action in hiring, "affirmative outreach" in recruitment does not implicate equal protection concerns because it merely expands the applicant pool, and an individual applicant has no right to compete against fewer rivals for a job.

In *Adarand Constructors, Inc. v. Pena*, the Supreme Court held that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." 515 U.S. 200, 224, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). The question before the court today, therefore, is whether a government mandate for recruitment targeted at minorities constitutes a "racial classification" that subjects persons of different races to "unequal treatment." We expressly reserved this question in *Lutheran Church-Missouri Synod v. FCC*, 332 U.S. App. D.C. 165, 154 F.3d 487, 492 (1998), *denying reh'g* in *Lutheran Church*, 141 F.3d 344 ("Whether the government can encourage -- or even require -- an outreach program specifically targeted on minorities is, of course, a question we need not decide").

Among our sister circuits only one has heretofore considered the level of constitutional scrutiny applicable to affirmative

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** Significantly, the Commission does not argue that Option B creates no pressure to recruit women and minorities because a licensee could always elect Option A. That argument would be inconsistent with the fundamental structure of the rule. *See* Part II.B.4.

outreach, and even that decision has since been vacated. *See Allen v. Alabama State Board of Education*, 164 F.3d 1347 (11th Cir. 1999), vacated by 216 F.3d 1263 (11th Cir. 2000); *cf. Safeco Ins. Co. of America v. City of White House*, 191 F.3d 675, 692 (6th Cir. 1999) ("Outreach efforts may or may not require strict scrutiny"). In *Allen* the Eleventh Circuit held that "where the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable." *Id.* at 1352; *see also Sussman v. Tanoue*, 39 F. Supp. 2d 13, 27 (D.D.C. 1999) (noting that program "does not create preferences in hiring based on race or gender, and therefore need not be examined under strict scrutiny"). In a footnote, the Eleventh Circuit observed that there is some suggestion in *Adarand* "that all race-based actions, whether or not they lead to unequal treatment, are subject to strict scrutiny. *See Adarand*, 515 U.S. at 227. Courts, however, have not accepted this broad reading of *Adarand*." 164 F.3d at 1352 n.2 (citing *Lutheran Church*; *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 711 (9th Cir. 1997)).

We may assume, with the Eleventh Circuit, that *Adarand* requires strict scrutiny only of governmental actions that lead to people being treated unequally on the basis of their race. We nonetheless disagree with that court's (short-lived) conclusion that preferential recruiting "disadvantages no one." 164 F.3d at 1352.

Under Option B the Commission has compelled broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority

candidates.[***] As a result, some prospective non-minority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race. While the Commission's intentions are to benefit minorities rather than to disadvantage non-minorities, *Adarand* clearly holds that the standard of constitutional review does not turn upon the race of those benefitted by a particular government action. *See Adarand*, 515 U.S. at 224.

The Commission has designed a rule under which non-minorities are less likely to receive notification of job openings solely because of their race; that the most qualified applicant from among those recruited will presumably get the job does not mean that people are being treated equally--that is, without regard to their race--in the qualifying round. The new rule is therefore subject to strict scrutiny for compliance with the constitutional requirement that all citizens receive equal protection under the law.

3. Does the rule survive strict scrutiny?

[***] Recruiting expenditures are fixed in the short run; even if an employer increases its recruiting budget in response to the Commission's EEO rule, it then must follow the Commission's directive in determining how to allocate those funds. Here, the purpose of the rule is to raise the percentage of women and minorities in the applicant pool and, thereby, increase their chances of being hired. *See, e.g.*, R&O at ¶ 164 ("an increase in the number of women and minorities employed would indicate that our EEO requirements are effective in ensuring outreach"). If an employer believed that it could reach the maximum number of good prospects with a display ad in the local newspaper, but they would likely be non-minorities, then it nonetheless would choose to run a smaller newspaper ad and use its remaining funds to run an ad in a publication targeted at minorities. This redirection of resources hurts those prospective non-minority applicants who would respond to the display ad but not to the smaller ad, and it does so only because of their race.

For a government action to withstand strict scrutiny it must "serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235. The Broadcasters fault the new EEO regulations in both respects.

The matter of a compelling governmental interest is somewhat vexed. Echoing their earlier claim that the new rule is arbitrary and capricious because the Commission lacks a proper goal, the Broadcasters again focus primarily upon the Commission's secondary goal of promoting "programming diversity," which we rejected in *Lutheran Church*. With respect to the Commission's primary motivation, the Broadcasters offer only the conclusory assertion that "deterring imaginable future discrimination is not a compelling governmental interest." The Government responds by asserting that it has a compelling interest both in remedying the effects of past discrimination and in preventing future discrimination in the distribution of public benefits. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 628, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984). But the Government's remedial interest is compelling only with respect to "identified discrimination," *see Shaw v. Hunt*, 517 U.S. 899, 909, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996), and it is far from clear that future employment in the broadcast industry is a public benefit for which the Government is constitutionally responsible. Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961) (holding that racial discrimination by private restaurant located in public parking garage "indicates that degree of state participation and involvement which it was the design of the Fourteenth Amendment to condemn").

We need not resolve the issue of a compelling governmental interest in preventing discrimination, however, because the Broadcasters argue convincingly that the new EEO rule is not narrowly tailored to further that interest. First, Option B places

pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future. Quite apart from the question of a compelling governmental interest, such a sweeping requirement is the antithesis of rule narrowly tailored to meet a real problem. *Cf., e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (noting that City's "interest in avoiding the bureaucratic effort necessary to tailor remedial relief ... cannot justify a rigid line drawn on the basis of a suspect classification").

The requirement in Option B that licensees report the race of each applicant is another departure from the norm of narrow tailoring and a corollary, no doubt, of the Commission's true interest in results rather than mere outreach. The race of each job applicant is relevant to the prevention of discrimination only if the Commission assumes that minority groups will respond to non-discriminatory recruitment efforts in some predetermined ratio, such as in proportion to their percentage representation in the local workforce. Any such assumption stands in direct opposition to the guarantee of equal protection, however. *See Lutheran Church*, 141 F.3d at 352 (noting that Commission's claim that its goal of proportional representation was equivalent to goal of nondiscrimination "presupposes that non-discriminatory treatment typically will result in proportional representation in a station's workforce. The Commission provides no support for this dubious proposition"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class"). The racial data required by Option B simply are not probative on the question of a licensee's efforts to achieve "broad outreach," much less

narrowly tailored to further the Commission's stated goal of non-discrimination in the broadcast industry. Because Option B of the new EEO rule is not narrowly tailored, it does not withstand strict scrutiny, and we hold that it violates the equal protection component of the Due Process Clause of the Fifth Amendment.

4. Severability

In light of our holding that Option B is unconstitutional with respect to minorities, we must address the Commission's request that we sever the unconstitutional aspects and leave the rest of the new EEO rule in place. Whether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988). Here, the Commission clearly intends that the regulation be treated as severable, to the extent possible, for it said so in adopting the regulation. R&O at ¶ 232. The question for the court, then, is whether the balance of the rule can function independently if shorn of its unconstitutional aspects.

The core of the rule, by Commission design, is to provide broadcasters with two alternatives. As the Commission explained in the report adopting the rule, its goal is to "ensure broad outreach while affording broadcasters flexibility in designing their EEO programs" and, to this end, the rule obligates broadcasters to "comply with one of ... two outreach options." R&O at ¶ 78. The Commission understandably, therefore, did not consider the loss of flexibility that eliminating the "alternative recruitment program" in Option B would entail. Presumably, however, the Commission would not have created Option B if it believed that Option A by itself was sufficient to achieve the Commission's goals. In any event, the court cannot

by severing one alternative make the other mandatory; to do so would undercut the whole structure of the rule.

Nor can the court simply cut out all references to "minorities" in the regulation, thereby leaving the regulation intact with respect to women. True, a classification imposing unequal treatment based upon sex is subject to intermediate rather than to strict scrutiny, *see United States v. Virginia*, 518 U.S. 515, 533, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996) (classification based upon sex must serve "important government objectives" and must be "substantially related to the achievement of those objectives"), and therefore might survive where the same regulation fails with respect to minorities. Nothing in the rule, however, indicates that the Commission would or sensibly could grant a greater preference to white women than to minority men. On the contrary, when we held in *Lutheran Church* that the Commission's prior EEO rule was unconstitutional with respect to minorities, the Commission suspended the rule with respect to women as well, rather than allow even an interim period in which women but not minorities got preferential treatment. Thereafter the Commission issued the new rule, again treating women and minorities alike. At every turn, therefore, we see the Commission treating women and minorities identically.

In these circumstances, it is clear that severing all references to minorities would severely distort the Commission's program and produce a rule strikingly different from any the Commission has ever considered or promulgated in the lengthy course of these proceedings. Accordingly, we hold that the unconstitutional provisions of the rule cannot be severed and the entire rule must be vacated.

III. Conclusion

For the reasons stated in the opinion, the Broadcasters' petition for review is granted and the rule is vacated in its

entirety. In view of the foregoing, the petition of the UCC is denied as moot.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1094, Consolidated with 00-1198

MD/DC/DE BROADCASTERS ASSOCIATION, ET AL.,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, ET AL.,

INTERVENORS.

Filed June 19, 2001

On Petitions for Rehearing.

Before: GINSBURG, SENTELLE and HENDERSON, Circuit Judges.

Opinion for the court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

The respondents in this case, the Federal Communications Commission and the United States; one of the petitioners, the United Church of Christ; and the intervenors, the National Organization for Women and the Minority Media and Telecommunications Council, have each petitioned for rehearing. All but MMTC seek rehearing of the court's decision not to sever Option B from the Commission's EEO rule after holding that only that aspect of the challenged rule was unconstitutional. The NOW seeks rehearing of the court's decision not to sever all references in the rule to minorities and thereby leave the rule intact with respect to women. Only the UCC and the Intervenors seek rehearing of the court's underlying conclusion that Option B is unconstitutional.[1]

The only issue about which the various petitions raise any points that were not fully considered in our prior opinion is the severability of Option B. For the reasons set forth below, we adhere to our original conclusion that Option B is not severable and hence deny the petitions for rehearing.

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Before arguing that the panel erred in vacating the entire EEO rule rather than vacating Option B alone, the Commission

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[1] Our dissenting colleague argues that the constitutional question, too, merits reconsideration, despite the Commission's decision not to seek rehearing on that issue. In so arguing, the dissent repeatedly claims the Commission's only goal is "broad outreach." As explained in the panel opinion, however, if the Commission's goal were truly broad outreach, then it could measure compliance by looking at a broadcaster's outreach efforts rather than -- as it does -- by collecting data on the race and sex of applicants and investigating any broadcaster producing "few or no" women and minorities in its applicant pools. See *Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 2329, ¶ 120 (2000) (R&O). On remand, of course, the Commission is free to revise its EEO rule to make broad outreach rather than the race and sex of applicants the measure of compliance.

acknowledges that severance is proper in a case where, as here, the agency has "stated its intent that an unconstitutional portion of a regulation be severed," only "when such intent is rational, i.e., . . . when 'the remainder of the regulation could function sensibly without the stricken provision.' " FCC Pet. for Rehearing at 1 (quoting MD/DC/DE Broadcasters, 236 F.3d at 22); *see also K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988).[2] In this case, the court recognized that in the rulemaking proceeding the Commission had expressed its intent as a general preference for severance. *See MD/DC/DE Broadcasters*, 236 F.3d at 22 (citing Report & Order, 15 F.C.C.R. 2329, ¶ 232, 2000 WL 124381 (2000) (R&O) ("If any provision of the rules . . . is held to be unlawful, the remaining portions of the rules . . . shall remain in effect"). The court concluded, however, that the rule could not, without Option B, sensibly serve the goals for which it was designed.

The Commission marshals three reasons that, in its view, undermine our conclusion. First, citing paragraph 113 of the decision under review, the Commission argues that it "clearly stated that Option A was sufficient by itself to achieve the Commission's goals." *See* FCC Pet. for Rehearing at 10-11 (emphasis supplied). That, however, is not quite so.

The Commission had two goals in adopting its EEO rule: It sought to "ensure broad outreach in recruitment while affording broadcasters flexibility in designing their EEO programs." R&O at ¶ 78. In paragraph 113 of the Report and Order, in which the Commission now claims that it "clearly stated" that

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[2] The dissent questions the panel's interpretation of *K-Mart* and produces a passel of arguments. We address here all the arguments raised in the petitions.

Option A alone could accomplish both its goals, the Commission actually said this:

> We believe that our goal of ensuring that broadcasters engage in broad outreach so that all qualified job candidates are informed of employment opportunities in the industry can be accomplished through compliance with Option A, without requiring the collection or reporting to the Commission of applicant pool data. . . . However, if a broadcaster wishes to avail itself of the option of dispensing with the supplemental recruitment measures prescribed in Option A and designing its own program pursuant to Option B, we do not think that it is unreasonable to require it to collect applicant pool data demonstrating that its outreach efforts are inclusive.

Id. at ¶ 113 (emphasis added). As can readily be seen, the Commission, despite its present argument to the contrary, did not state -- "clearly" or otherwise -- that it could achieve both its goals with Option A alone; at most, it stated that it believed it could achieve one of its two goals, namely ensuring broad outreach. It said nothing about the sufficiency of Option A in achieving the Commission's other goal, namely "affording broadcasters flexibility."

Second, the Commission argues that in a footnote appended to an order denying reconsideration of the rule it implicitly indicated that Option A could function alone. *See* Reconsideration Order, 15 FCC Rcd at 22555 n. 19. In that footnote the Commission stated that if the court should hold the data collection requirement in Option B unconstitutional, then only that option should be invalidated. The conclusory statement in the Reconsideration Order, however, says barely more on this issue than does the Report and Order under review. Again, for the Commission to say that it intends that the court sever Option B if necessary is not to say that the court's

decision to do so would leave a sensible regulation in place. As we discuss further below, it would not.

Third, counsel for the Commission argues that, even if the Commission did not previously make clear that in its view Option A could function sensibly as a freestanding EEO rule, it has done so now in its petition for rehearing. In that petition, Commission counsel unequivocally states that "the Commission would have adopted the remainder of the EEO rule even without Option B." The Federal Communications Commission is a collegial body, however; it speaks through its orders, not through counsel's filings. The dissent points to a press release issued by a single Commissioner in which she refers to the petition for rehearing as an action of "the Commission." The same press release, however, cautions that "Release of the full text of a Commission order constitutes official action." Yet counsel points to no order taking the view espoused in the petition for rehearing. Furthermore, counsel's claim is facially implausible.

Recall that in the decision under review, the Commission told us that it had two goals -- ensuring broad outreach and affording flexibility. It told us that Option A could satisfy the goal of achieving broad outreach. And it told us that Option B was added in order to afford broadcasters flexibility. For example, in announcing that it would not exempt stations in small markets from EEO obligations, the Commission explained:

> While we believe that small market stations should be granted some relief from EEO requirements . . . we believe that such relief is already built into the new broadcast EEO Rule, which affords flexibility to tailor EEO programs to a station's particular circumstances, including market size. For instance, stations in small markets may find that they need fewer recruitment sources to achieve broad outreach than might be the case

> in larger markets. Also, because stations in smaller markets are likely to attract fewer applicants, they may find Option B a less burdensome method of assessing the effectiveness of their outreach.

R&O at ¶ 126; *see also id.* at ¶ 104.

Throughout the Report and Order, the Commission repeatedly considered various proposals and evaluated them with respect both to their benefits in promoting outreach and to the effect they would have upon broadcasters' flexibility. *See, e.g.*, R&O at ¶ 88 (permitting broadcasters to engage in joint recruiting and noting "there is considerable value in allowing individual broadcasters flexibility"); *id.* at ¶ 95 (rejecting proposal to send notice of openings to all potential sources of job applicants); *id.* at ¶ 97 (granting broadcasters flexibility in selecting form of notice); *id.* at ¶ 110 (expressing desire to "minimize burdens on broadcasters, especially smaller broadcasters"); *id.* at ¶ 121 (same); *id.* at ¶ 126 (rejecting proposal for relief in light of flexibility afforded to broadcasters, and emphasizing role of Option B to this end); *id.* at ¶ 131 (rejecting proposal for relief in light of flexibility afforded under rule). Thus, Option B played an integral part in the Commission's evaluation of the rule as a whole; indeed, in the entire Report and Order the Commission never once considered the implications of promulgating an EEO rule without Option B -- except insofar as it implied that without Option B broadcasters would not have sufficient flexibility.[3]

Finally, Commission counsel argues that vacating the rule in its entirety will, by forcing the Commission to repromulgate Option A as a new rule, simply cause the Commission expense

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[3] The dissent does not address the Commission's reliance, in denying various exemptions, upon the flexibility provided in the rule as a whole and in particular by Option B.

and delay. Under the Administrative Procedure Act, however, we cannot consider that a drawback. As explained above, in the decision under review the Commission described its two goals and the role that the two options played in effectuating them. In light of that decision, it is clear that severing one of the two options and thereby making the other mandatory would create a rule that the Commission did not consider and which, according to the Commission's own analysis in the course of rulemaking, would not have accomplished the Commission's two goals as it described them. In a renewed rulemaking effort the Commission may adopt other measures to accommodate the concerns it expressed about broadcasters' need for flexibility in general and about the burden Option A would impose upon broadcasters in small markets in particular. Or the Commission may change its goals. Upon the record as it stands, however, retaining Option A without further consideration -- and presumably further notice and comment -- would leave in force a rule that, in view of the Commission's own stated goals, would be arbitrary and capricious. Accordingly, the petition for rehearing is

Denied.

BEFORE: EDWARDS, Chief Judge, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND, Circuit Judges.

ORDER

Petitioner's, respondents', and intervenors' petitions for rehearing en banc and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petitions. Upon consideration of the foregoing, it is

ORDERED that the petitions be denied.

Circuit Judge GARLAND did not participate in this matter.

A statement of Circuit Judge TATEL, joined by Chief Judge HARRY T. EDWARDS and Circuit Judge ROGERS, dissenting from the denial of rehearing en banc is attached.

TATEL Circuit Judge, joined by HARRY T. EDWARDS, Chief Judge, and ROGERS, Circuit Judge, dissenting from the denial of rehearing en banc:

"A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). The same principle governs facial challenges to regulations. *See INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188, 116 L. Ed. 2d 546, 112 S. Ct. 551 (1991). In this case, the panel found that Option B could not be applied without harming white males and therefore declared it facially unconstitutional. Because in so ruling the panel departed from basic principles of judicial restraint -- going beyond the record, speculating about how the Commission will enforce the rule and how broadcasters might react, and refusing to defer to the Commission's reasonable interpretation of its own rule -- I respectfully dissent from the denial of the three suggestions for rehearing en banc. See also FCC Pet. for Reh'g & Suggestion for Reh'g En Banc at 3 ("The limited scope of our rehearing petition . . . should not be misread as reflecting the Commission's agreement with the Court's conclusion that Option B pressures broadcasters to recruit women and minorities in violation of the equal protection component of the Fifth Amendment. The Commission disagrees with the Court's conclusions in that regard and would welcome grant of rehearing on the Court's equal protection analysis.").

I agree with the panel that *Adarand* "requires strict scrutiny only of governmental actions that lead to people being treated unequally on the basis of their race." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 20 (D.C. Cir. 2001). But I do not agree that, on its face, Option B -- which is entirely optional -- triggers strict scrutiny. Contrary to the panel opinion, Option B merely requires outreach to the entire community, and broadcasters can accomplish such outreach without reducing their recruitment of white males.

"We require," the Commission said of the entire rule, that broadcasters "reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sectors of their communities." Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies, 15 FCC Rcd 2329, p 3 (2000) ("R&O"). Broadcasters choosing Option B may "design their own outreach program to suit their needs, as long as they can demonstrate that their program is inclusive, i.e., that it widely disseminates job vacancies through the local community." *Id.* at ¶ 104. The Commission explained further:

> We believe that the objective of ensuring that minority and female applicants have the opportunity to apply for positions . . . may be achieved without a specific requirement that broadcasters in every situation use recruitment methods that specifically target those groups. Outreach that is truly broad and inclusive will necessarily reach minorities and females.

Id. at ¶ 77. Moreover, Option B requires submission of racial data only to enable "evaluation of whether the program is effective in reaching the entire community." *Id.* at ¶ 104. Although "few or no" minority or female applicants "may be one indication . . . that the station's outreach efforts are not reaching the entire community," *id.* at ¶ 120, the Commission emphasized that having few or no female or minority applicants

would not be dispositive in its analysis of the adequacy of a broadcaster's recruitment program:

> There is no requirement that the composition of applicant pools be proportionate to the composition of the local workforce. . . . We may ultimately determine that outreach efforts are reasonably designed to reach the entire community, even if few females or minorities actually apply for openings. Conversely, the fact that a sizeable number of females or minorities have applied for openings will not necessarily establish the inclusiveness of the station's efforts. Also, we recognize that an employer cannot control who applies for jobs.

Id.

Broadcasters electing Option B could thus satisfy their obligation simply by undertaking broad, non-racially-targeted recruiting. For example, advertising in a local newspaper read by both minorities and nonminorities could reach "the entire community." *Id.* No record evidence suggests that such advertising would reduce the number of white males receiving job information. Indeed, broad outreach might reach more white males.

Because there exist "circumstances . . . under which" broadcasters can comply with Option B with no adverse effect on white males, the broadcasters' facial challenge should have failed. *See Salerno*, 481 U.S. at 745. The panel should have dismissed their petition, leaving them free to bring an as applied challenge when and if the Commission applies the rule in a discriminatory manner. Instead, misinterpreting Option B and engaging in its own fact-finding, the panel found that Option B would inevitably curtail recruitment of white males, and so subjected it to strict scrutiny.

To avoid the fact that broadcasters could totally ignore Option B, the panel said "the Commission does not argue that

Option B creates no pressure to recruit women and minorities because a licensee could always elect Option A." 236 F.3d at 20 n.*. In its Report and Order, however, the Commission stated precisely that:

> We note that the alternative recruitment program is completely optional; any employer who prefers not to collect data concerning the race, ethnicity or gender of its applicants can comply with Option A's requirements, none of which requires the collection of such data. No broadcaster or cable entity has cause to complain about a program with which it is not required to comply.

R&O at ¶ 224. True, the Commission did not make this argument to the panel, but given that the broadcasters challenged the constitutionality of Option A as well as B, it is understandable that the Commission never argued that Option B is not coercive because of the presence of Option A. Although the Commission could have so argued in the alternative, the fact that it didn't still does not justify ignoring the Rule's plain language.

To avoid the fact that nothing on the face of Option B requires that "people be treated unequally on the basis of their race," *MD/DC/DE Broadcasters*, 236 F.3d at 20, the panel found that Option B "pressures" broadcasters to "focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications." *Id.* at 19-20. According to the panel, this will occur because the Commission, having "life and death power" over broadcasters and "a long history of employing 'a variety of sub silentio pressures and "raised eyebrow" regulation,'" *id.* at 19 (*quoting Cmty.-Serv. Broad. of Mid-Am., Inc. v. FCC*, 192 U.S. App. D.C. 448, 593 F.2d 1102, 1116 (D.C. Cir. 1978)), "promises to investigate any licensee that reports 'few or no' applications from women or minorities." *Id.*; see also Supplemental Op. at 2 n.*. Licensees, the panel found,

"reasonably might (and prudently would) conclude" that the Commission's "focus upon the race and sex of applicants belies its statement . . . that its only goal is that licensees recruit with a 'broad outreach.'" *MD/DC/DE Broadcasters*, 236 F.3d at 19. The panel concluded that the Commission "is interested in results, not process, and is determined to get them." *Id.*

The panel's analysis finds no support in the record. The Commission never "promised" to investigate licensees that report few or no applications from women or minorities. The only record reference to the Commission's investigative priorities is its statement that: "Each year we will randomly select for audit approximately five percent of all licensees. . . . We may also conduct an inquiry if the Commission has evidence of a possible violation of the EEO Rule." R&O at ¶ 145 (emphasis added). Moreover, the Commission made clear that, in evaluating a broadcaster's outreach program, it would not view as dispositive the number of women and minorities in the broadcaster's applicant pool. *See supra* at 2-3 (quoting R&O at ¶ 120). Because broadcasters could thus accomplish broad outreach without race-targeted recruiting, speculation that some broadcasters, imagining pressure from the Commission or misreading the agency's intentions, might go beyond what Option B requires is no reason to declare it facially unconstitutional. Finally, the panel had no basis for suspecting the Commission's intentions. Not only do the phrases "sub silentio pressures" and " 'raised eyebrow' regulation" describe Commission behavior occurring over two decades ago, *see supra* at 4, but nothing in the record of this case indicates that such behavior continues today or that the Commission's goal is anything other than what it declares it to be: broad outreach.

It is possible, as the panel suggested with its own hypothetical, that some broadcasters might redirect recruiting efforts so that "prospective nonminority applicants who would have learned of job opportunities but for the Commission's

directive now will be deprived of an opportunity to compete simply because of their race." 236 F.3d at 21. Yet Option B does not require this result, nor does record evidence support the panel's assumption that nonminorities will inevitably receive less job information. Even assuming, as the panel speculated, that recruiting budgets are "fixed in the short run," *id.* at 20 & n.**, there is no reason to believe that broadcasters would not reallocate recruiting expenditures without depriving nonminorities of job information. Nor does record evidence support the panel's assumption that "even if an employer increases its recruiting budget," it will necessarily use those additional funds for recruiting that is "targeted at minorities." *Id.* at 20 n.**. In fact, the Commission expressly declined to require targeted recruiting. *See supra* at 2 (quoting R&O at ¶ 77). Of course, community-wide outreach could mean that white males would face job competition from women and minorities, but not even the panel suggested that this would trigger strict scrutiny.

Determining whether an outreach program crosses the line from expanding opportunities for minorities to disadvantaging nonminorities, thus triggering strict scrutiny -- and if so whether the program survives -- are difficult issues that neither we nor the Supreme Court has yet considered. We should be especially careful to resolve these important questions on a fully developed record, not on the basis of appellate fact-finding or broadcaster paranoia.

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The panel's decision that Option B is not severable also warrants en banc review. *See* FCC Pet. for Reh'g & Suggestion for Reh'g En Banc. The decision conflicts with circuit precedent and, like the panel's resolution of the equal protection issue, rests on the panel's rejection of the Commission's reasonable interpretation of its own Rule.

Agency intent has always been the touchstone of our inquiry into whether an invalid portion of a regulation is severable. *See, e.g., Davis County Solid Waste Mgmt. v. EPA*, 323 U.S. App. D.C. 425, 108 F.3d 1454, 1459 (D.C. Cir. 1997); *North Carolina v. FERC*, 235 U.S. App. D.C. 28, 730 F.2d 790, 795-96 (D.C. Cir. 1984). In this case, the panel acknowledged that "the Commission clearly intends that the regulation be treated as severable." 236 F.3d at 22 (citing the Commission's statement that "it is our intention . . . that, if any provision of the rules . . . is held to be unlawful, the remaining portions of the rules not deemed unlawful . . . shall remain in effect to the fullest extent permitted by law," R&O at ¶ 232). But relying on *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988), the panel undertook an additional inquiry, asking "whether the remainder of the regulation could function sensibly without the stricken provision." 236 F.3d at 22. Answering no, the panel invalidated the entire Rule. According to the panel, "the core of the rule, by Commission design, is to provide broadcasters with two alternatives," *id.*, a goal unattainable by Option A alone.

K Mart concerned a different question than the one presented here. There, the question was whether a statute's function would be impaired if, after invalidating a portion of an implementing regulation, the Court left the rest of the regulation in place. 486 U.S. at 294. Here, the question is whether the Commission's Rule can function without Option B. As in the case of any agency interpretation of its own regulation, this is an issue on which we owe the Commission's views special deference. *See Trinity Broad. of Fla., Inc. v. FCC*, 341 U.S. App. D.C. 191, 211 F.3d 618, 625 (D.C. Cir. 2000) ("We accord the Commission's interpretation of its own regulations a high level of deference, accepting it unless it is plainly wrong.") (internal citation omitted).

Regardless of whether the panel may have had cause to doubt whether Option A alone could have accomplished the Commission's goals, such doubt no longer exists. In its petition for rehearing, the Commission makes it unmistakably clear not only that it "intended Option B to be severable from the remainder of the rule," *see* FCC Pet. for Reh'g & Suggestion for Reh'g En Banc at 10, but also that Option A alone can accomplish the agency's "core" goal of ensuring broad outreach. *Id.* at 13. When agencies clarify their intentions regarding severability through petitions for rehearing, we normally correct our opinion and reinstate the valid portions of the regulation. *See Virginia v. EPA*, 325 U.S. App. D.C. 155, 116 F.3d 499, 500-01 (D.C. Cir. 1997) (reinstating part of a rule in response to EPA's petition for rehearing explaining that the part was severable from sections invalidated in the original panel decision); *Davis County Solid Waste Mgmt.*, 108 F.3d at 1455-56, 1459-60 (same). In this case, however, the panel summarily rejects the Commission's clarification, attributing it to "counsel's" position. *See* Supplemental Op. at 4-5 ("counsel for the Commission argues . . . "; "Commission counsel unequivocally states . . . "; "counsel's claim"). To the extent the panel is implying that the petition does not reflect the Commission's views and is thus unworthy of deference, that notion is flatly inconsistent with decisions of the Supreme Court and the law of this circuit. In *Auer v. Robbins*, 519 U.S. 452, 137 L. Ed. 2d 79, 117 S. Ct. 905 (1997), the Supreme Court held that unless a court has "reason to suspect" that an interpretation of a regulation set forth in an agency brief does "not reflect the agency's fair and considered judgment," the agency's interpretation deserves deference. *Id.* at 462; *see also Bigelow v. Dep't of Def.*, 342 U.S. App. D.C. 369, 217 F.3d 875, 876, 878 (D.C. Cir. 2000) (deferring to an agency interpretation of a regulation set forth for the first time in a brief signed only by a United States Attorney). In this case, we have no basis for suspecting that the rehearing petition does not

"reflect the Commission's fair and considered judgment." The filing is signed by the Commission's "Acting General Counsel," the Justice Department has told us that it "defers to the FCC on the importance of the severability issue," Resp. to Pets. for Reh'g at 7 (emphasis added), and Commissioner Gloria Tristani, in a press release issued the day the petition was filed, referred to the action of the "Commission." Press Release, Commissioner Gloria Tristani, Re: *MD/DC/DE Broadcasters Ass'n v. FCC Pet. for Reh'g* (Mar. 2, 2001) ("Today, the FCC petitioned the D.C. Circuit Court for a partial rehearing of its January 16, 2001, opinion invalidating our EEO outreach rules for broadcasters. While I support the submission as far as it goes, I am disappointed the Commission declined to seek review of the entire decision.") (emphasis added).

In addition, the panel has no reason for finding the Commission's position "implausible." Supplemental Op. at 5. Although the panel points to a few paragraphs in the Report and Order suggesting that Option A by itself might provide less flexibility than Options A and B together, there is enough flexibility in Option A alone to demonstrate that the Commission's statement that it would have promulgated Option A by itself is not "plainly wrong." *Trinity Broad.*, 211 F.3d at 625. The thirteen program choices within Option A, the Commission explained, avoided "inflexible requirements" and "enabled broadcasters to select the approaches that they believe will be most effective in their situations." R&O at ¶ 100. The Commission, moreover, emphasized that Option A would independently meet its outreach goals. *See id.* at ¶ 113. According to the Commission, it reluctantly included Option B in response to broadcasters' urging: "We are willing to allow broadcasters to forego the supplemental recruitment measures of Option A and to design their own outreach program to suit their needs, as long as they can demonstrate that their program is inclusive, i.e., that it widely disseminates job vacancies throughout the local community." *Id.* at ¶ 104 (emphasis

added). As the Commission argues, the "core of the rule" is Option A. *See* FCC Pet. for Reh'g & Suggestion for Reh'g En Banc at 13.

There is, in other words, no "substantial doubt" that the Commission would have adopted Option A "on its own." *See Davis County Solid Waste Mgmt.*, 108 F.3d at 1459. In reaching a different conclusion, the panel improperly substituted its own views for the Commission's.

APPENDIX C

47 C.F.R. § 2080

(a) General EEO Policy. Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV, Class A TV, or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex. Religious radio broadcasters may establish religious belief or affiliation as a job qualification for all station employees. However, they cannot discriminate on the basis of race, color, national origin or gender from among those who share their religious affiliation or belief. For purposes of this rule, a religious broadcaster is a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity.

(b) General EEO program requirements. Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice. Under the terms of its program, a station shall:

(1) Define the responsibility of each level of management to ensure vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

(2) Inform its employees and recognized employee organizations of the equal employment opportunity policy and program and enlist their cooperation;

(3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national

origin, or sex, and solicit their recruitment assistance on a continuing basis;

(4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin, or sex from its personnel policies and practices and working conditions; and

(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.

(c) Specific EEO program requirements. Under the terms of its program, a station employment unit must:

(1) Recruit for every job vacancy in its operation. A job filled by an internal promotion is not considered a vacancy for which recruitment is necessary. Religious radio broadcasters who establish religious affiliation as a qualification for a job position are not required to comply with these recruitment requirements with respect to that job position or positions, but will be expected to make reasonable, good faith efforts to recruit applicants who are qualified based on their religious affiliation. Nothing in this section shall be interpreted to require a broadcaster to grant preferential treatment to any individual or group based on race, color, national origin, religion, or gender.

(i) A station employment unit shall use recruitment sources for each vacancy sufficient in its reasonable, good faith judgment to widely disseminate information concerning the vacancy.

(ii) In addition to such recruitment sources, a station employment unit shall provide notification of each vacancy to any organization that distributes information about employment opportunities to job seekers or refers job seekers to employers,

upon request by such organization. To be entitled to notice of vacancies, the requesting organization must provide the station employment unit with its name, mailing address, e-mail address (if applicable), telephone number, and contact person, and identify the category or categories of vacancies of which it requests notice. (An organization may request notice of all vacancies).

(2) Engage in at least four (if the station employment unit has more than ten full-time employees) or two (if it has five to ten full-time employees) of the following initiatives during each two-year period preceding the filing of a Statement of Compliance pursuant to subsection (g) hereof:

(i) Participation in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions;

(ii) Hosting of at least one job fair;

(iii) Co-sponsoring at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities;

(iv) Participation in at least four events sponsored by organizations representing groups present in the community interested in broadcast employment issues, including conventions, career days, workshops, and similar activities;

(v) Establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment;

(vi) Participation in job banks, internet programs, and other programs designed to promote outreach generally (i.e., that are not primarily directed to providing notification of specific job vacancies);

(vii) Participation in scholarship programs designed to assist students interested in pursuing a career in broadcasting;

(viii) Establishment of training programs designed to enable station personnel to acquire skills that could qualify them for higher level positions;

(ix) Establishment of a mentoring program for station personnel;

(x) Participation in at least four events or programs sponsored by educational institutions relating to career opportunities in broadcasting;

(xi) Sponsorship of at least two events in the community designed to inform and educate members of the public as to employment opportunities in broadcasting;

(xii) Listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities;

(xiii) Participation in other activities designed by the station employment unit reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities.

(3) Analyze its recruitment program on an ongoing basis to ensure that it is effective in achieving broad outreach to potential applicants, and address any problems found as a result of its analysis.

(4) Periodically analyze measures taken to:

(i) Disseminate the station's equal employment opportunity program to job applicants and employees;

(ii) Review seniority practices to ensure that such practices are nondiscriminatory;

(iii) Examine rates of pay and fringe benefits for employees having the same duties, and eliminate any inequities based upon race, national origin, color, religion, or sex discrimination;

(iv) Utilize media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, national origin, color, religion or sex over another;

(v) Ensure that promotions to positions of greater responsibility are made in a nondiscriminatory manner;

(vi) Where union agreements exist, cooperate with the union or unions in the development of programs to assure all persons equal opportunity for employment, irrespective of race, national origin, color, religion, or sex, and include an effective nondiscrimination clause in new or renegotiated union agreements; and

(vii) Avoid the use of selection techniques or tests that have the effect of discriminating against any person based on race, national origin, color, religion, or sex.

(5) Retain records to document that it has satisfied the requirements of paragraphs (c) (1) and (2) of this section. Such records, which may be maintained in an electronic format, shall be retained until after grant of the renewal application for the term during which the vacancy was filled or the initiative occurred. Such records need not be submitted to the FCC unless specifically requested. The following records shall be maintained:

(i) Listings of all full-time job vacancies filled by the station employment unit, identified by job title;

(ii) For each such vacancy, the recruitment sources utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to paragraph (c)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person and telephone number;

(iii) Dated copies of all advertisements, bulletins, letters, faxes, e-mails, or other communications announcing vacancies;

(iv) Documentation necessary to demonstrate performance of the initiatives required by paragraph (c)(2) of this section, if applicable, including sufficient information to fully disclose the nature of the initiative and the scope of the station's participation, including the station personnel involved;

(v) The total number of interviewees for each vacancy and the referral-source for each interviewee; and

(vi) The date each vacancy was filled and the recruitment source that referred the hiree.

(6) Annually, on the anniversary of the date a station is due to file its renewal application, the station shall place in its public file, maintained pursuant to Sec. 73.3526 or Sec. 73.3527, and on its web site, if it has one, an EEO public file report containing the following information:

(i) A list of all full-time vacancies filled by the station's employment unit during the preceding year, identified by job title;

(ii) For each such vacancy, the recruitment source(s) utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to paragraph (c)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person and telephone number;

(iii) The recruitment source that referred the hiree for each full-time vacancy during the preceding year;

(iv) Data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and the total number of interviewees referred by each recruitment source utilized in connection with such vacancies; and

(v) A list and brief description of initiatives undertaken pursuant to paragraph (c)(2) of this section during the preceding year, if applicable.

(7) Stations shall substantially comply with paragraph (c)(1)(i) of this section in connection with hires for part-time positions. The provisions of paragraph (c) are not otherwise applicable to hires for part-time positions.

(d) Alternative recruitment requirements. A station employment unit may elect not to utilize the provisions of paragraph (c)(1)(ii) (notification to community groups) and (c)(2) (menu options) of this section, provided that it complies with the following requirements:

(1) The station employment unit shall maintain records as required by paragraph (c)(5)(i) through (iii) of this section and shall maintain, in lieu of the records required by paragraph (c)(5)(iv) through (vi) of this section, data reflecting the recruitment source, gender, and racial and/or ethnic status of applicants for each full-time job vacancy filled by the station employment unit;

(2) The station employment unit shall include in the annual EEO public file report required by paragraph (c)(6) of this section the information specified in paragraph (c)(6)(i) and (ii) and, in lieu of the information required by paragraph (c)(6)(iii) through (v), data reflecting, for each recruitment source utilized for any full-time vacancy during the preceding year, the total

number of applicants generated by that source, the number of applicants who were female, and the number of applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated.

(3) Station employment units electing to proceed under this paragraph shall otherwise comply with the requirements specified in paragraph (c) of this section.

(e) Election procedures. Within forty-five days of the effective date of this section, each station employment unit shall elect whether it wishes to utilize the recruitment procedures specified in paragraph (c) of this section or the alternate recruitment procedures specified in paragraph (d) of this section and shall file with the Commission a statement indicating the election which shall also be placed in the station(s) public inspection file maintained pursuant to Sec. 73.3526 or Sec. 73.3527. An applicant for a new station or for the transfer or assignment of an existing license filed on FCC Form 314 or 315 shall state its election on FCC Form 396-A submitted with the application. A station employment unit may change its election every two years at the time of the filing of the Statement of Compliance referenced in paragraph (i)(1) of this section, or at the time of the filing of its renewal application. If the station employment unit wishes to change its election, it shall so state in its Statement of Compliance or FCC Form 396 accompanying the renewal application.

(f) Mid-term review for broadcast stations. The Commission will conduct a mid-term review of the employment practices of each broadcast television station and each radio station that is part of an employment unit of more than ten full-time employees four years following the station's most recent license expiration date as specified in Sec. 73.1020. Each such licensee is required to file with the Commission the station's EEO public file report, as described in paragraphs (c)(6) or (d)(2) of this section, along with the relevant Statement of Compliance (Form

397), as described in paragraph (i)(1) of this section, four months before the date specified in the previous sentence. The EEO public file report should cover the station's activities during the 12-month period prior to its submission.

(g) Small station exemption. The provisions of paragraphs (b), (c), (d), (e), and (f) of this section shall not apply to station employment units that have fewer than five full-time employees.

(h) Definitions. For the purposes of this section:

(1) A full-time employee is a permanent employee whose regular work schedule is 30 hours per week or more. A part-time employee is a permanent employee whose regular work schedule is less than 30 hours per week.

(2) A station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

(i) Enforcement. The following provisions apply to employment activity concerning full-time positions at each broadcast station employment unit (defined in this part) employing five or more persons in full-time positions, except where noted.

(1) Each broadcast station shall file with the Commission a Statement of Compliance (FCC Form 397) stating whether the station has complied with the outreach provisions of this section during the two-year period prior to the date the station files the Statement. Before filing the Statement, stations shall review their recruitment activity during the two-year period along with requirements of this section and determine whether they have been in compliance with of this section during the relevant period. The Statement of Compliance shall also report any change in the station's recruitment election pursuant to paragraph (e) of this section. All broadcast stations, including those that are part of an employment unit with fewer than five

full-time employees, shall file a Broadcast Equal Employment Opportunity Program Report (Form 396) with their renewal application. As with Form 397, stations shall indicate on Form 396 whether they have complied with of this section. In addition, stations shall provide a narrative statement demonstrating how their recruitment efforts achieved broad and inclusive outreach during the two years prior to filing the Form 396. Stations should also include in Form 396 any change in recruitment election pursuant to paragraph (e) of this section. If the station believes it was not or may not have been in compliance, it shall submit an appropriate explanation on Form 396 or 397, as applicable. The Statement of Compliance (Form 397) is filed every second, fourth and sixth year of the license term, on the anniversary of the date the station is due to file its application for renewal of license. Form 396 is filed on the date the station is due to file its application for renewal of license. If a broadcast licensee acquires a station pursuant to FCC Form 314 or FCC Form 315 during the period that is to form the basis for the Statement of Compliance or Form 396, its Statement should be based on the licensee's EEO recruitment activity during the period starting with the date it acquired the station. Stations are required to maintain a copy of their Statement of Compliance and Form 396 in the station's public file in accordance with the provisions of Secs. 73.3526 and 73.3527.

(2) On the date a station is due to file for renewal of license, as part of Form 396, it shall file with the Commission an EEO public file report concerning recruitment activity during the 12-month period preceding the filing date. The required contents of the public file report are described in paragraphs (c)(6) or (d)(2) of this section. On the date each television station or radio station which is part of an employment unit with more than ten full-time employees files its Statement of Compliance (Form 397) at the mid-term point of its license term, the station shall file, together with Form 397, an EEO public file report concerning recruitment activity during the

12-month period prior to filing the EEO public file report. If any broadcast licensee acquires a station pursuant to FCC Form 314 or FCC Form 315 during the twelve months covered by the EEO public file report, its EEO public file report shall cover the period starting with the date it acquired the station.

(3) If a station is subject to a time brokerage agreement, the licensee shall file Statements of Compliance, Forms 396, and EEO public file reports concerning only its own recruitment activity. If a licensee is a broker of another station or stations, the licensee-broker shall include its recruitment activity for the brokered station(s) in determining the bases of the Statements of Compliance, Forms 396 and the EEO public file reports for its own station. If a licensee-broker owns more than one station, it shall include its recruitment activity for the brokered station in the Statements of Compliance, Forms 396, and EEO public file reports filed for its own station that is most closely affiliated with, and in the same market as, the brokered station. If a licensee-broker does not own a station in the same market as the brokered station, then it shall include its recruitment activity for the brokered station in the Statements of Compliance, Forms 396, and EEO public file reports filed for its own station that is geographically closest to the brokered station.

(4) Broadcast stations subject to this section shall maintain records of their recruitment activity necessary to demonstrate that they are in compliance with this section. Stations shall ensure that they maintain records sufficient to verify the accuracy of information provided in Statements of Compliance, Forms 396, and EEO public file reports. To determine compliance with this section, the Commission may conduct inquiries of licensees at random or if it has evidence of a possible violation of this section. In addition, the Commission will conduct random audits. Specifically, each year approximately five percent of all licensees in the television and

radio services will be randomly selected for audit, ensuring that, even though the number of radio licensees is significantly larger than television licensees, both services are represented in the audit process. Upon request, stations shall make records available to the Commission for its review.

(5) The public may file complaints throughout the license term based on a station's Statement of Compliance or the contents of a station's public file. Provisions concerning filing, withdrawing, or non-filing of informal objections or petitions to deny license renewal, assignment, or transfer applications are delineated in Secs. 73.3584 and 73.3587-73.3589.

(j) Sanctions and remedies. The Commission may issue appropriate sanctions and remedies for any violation of this section.

APPENDIX D

Relevant Provisions of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding,[1] *Report and Order*, MM Docket Nos. 96-16, 98-204, 15 F.C.C. Rcd. 2329. Released February 2, 2000; Adopted January 20, 2000.

By the Commission: Chairman Kennard and Commissioners Ness and Powell issuing separate statements; Commissioner Tristani approving in part, dissenting in part and issuing a statement; Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. In this *Report and Order*, we adopt a new broadcast equal employment opportunity ("EEO") Rule and policies[2], consistent with the D.C. Circuit's decision in *Lutheran Church - Missouri*

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[1] *Streamlining Broadcast EEO Rule and Policies*, MM Docket No. 96-16, 11 FCC Rcd 5154 (1996)*(Streamlining)*.

[2] The broadcast EEO Rule, 47 C.F.R. § 73.2080, covers "all licensees or permittees of commercially or noncommercially operated AM, FM, TV, or international broadcast stations." In addition, pursuant to *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHZ Frequency Band*, 12 FCC Rcd 5754, 5791 (1997), Digital Audio Radio Service by satellite is also covered by our EEO Rule. Prior to their suspension, discussed below, several different EEO forms were required to be filed by broadcasters, including a Broadcast Station Annual Employment Report (Form 395-B), a Broadcast EEO Program Report (Form 396) filed with a station's renewal application, and a Broadcast EEO Model Program Report (Form 396-A) filed with an assignment, transfer, or construction permit application.

Synod v. FCC;[3] amend our EEO rules and policies applicable to cable entities,[4] including multichannel video programming distributors ("MVPDs"),[5] to conform them, as much as possible, to the broadcast EEO Rule; establish our authority to retain the anti-discrimination provisions of our broadcast EEO Rule; and terminate MM Docket Nos. 98-204 and 96-16, *Streamlining Broadcast EEO Rule and Policies*, 13 FCC Rcd 6322 (1998) ("*Order and Policy Statement*"). The new broadcast EEO Rule and modified EEO rules for cable entities, adopted herein, emphasize outreach in recruitment to all qualified job candidates and ban discrimination on the basis of race, color, national origin or gender.

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[3] 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*").

[4] Our cable EEO rules, 47 C.F.R. § 76.71, et. seq. ("cable EEO rules"), were implemented pursuant to Section 634 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). *See also* 47 C.F.R. §§ 21.920, 25.601, 74.996, 76.1702, 76.1802, and 100.51. Cable entities are required to file Annual Employment Reports (Form 395-A for cable operators and satellite master antenna television systems ("SMATV") and Form 395-M for multichannel video programming distributors) and are also required to file a Supplemental Investigation Sheet ("SIS" or "SIS form") every five years.

[5] "A multichannel video programming distributor is an entity such as, but not limited to, a cable operator, a multipoint distribution service, a multichannel multipoint distribution service ["MMDS"], a direct broadcast satellite service ["DBS"], a television receive-only satellite program distributor, and a video dialtone program service provider..." 47 C.F.R. § 76.71(a). The term "cable" in this *Report and Order* includes multichannel video programming distributors that control the programming that they distribute. 47 U.S.C. § 554(h)(1); 47 C.F.R. § 76.71(a).

2. Pursuant to the Communications Act of 1934, as amended ("Communications Act"), this Commission is charged with the responsibility of regulating "interstate and foreign communications services so that they are available, so far as possible, to all people of the United States, without discrimination on the basis of race, religion, national origin, or sex..."[6] The Commission is also mandated to license individuals and companies to use the radio spectrum as the "public interest, convenience, and necessity" require.[7] While we have grappled over the years with the task of giving form and content to that statutory mandate, we have no doubt that it requires us to deny licenses to those who would discriminate on the basis of race, ethnicity or gender. Such persons do not have the basic character qualifications to hold a valuable government license. And the licenses that we grant to broadcasters are not like any others granted by government. They afford licensees the privilege and the power to air programming -- entertainment, news, public affairs, educational -- that exerts a powerful influence on our culture and shared values and helps shape and inform public opinion on myriad issues of public importance. We do not believe that a licensee who discriminates against minorities or women would be able or inclined to fulfill its responsibility as a public trustee to provide a program service that airs diverse viewpoints, enriches public debate, and is responsive to the needs and interests of all sectors of its community. We can expect no less of broadcast licensees or cable entities under the Communications Act.[8]

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[6] 47 U.S.C. § 151, as amended (1997).

[7] 47 U.S.C. §§ 307, 309.

[8] *See* 47 U.S.C. §§ 151, 303(f), (g), (r); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795-800 (1978); NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976) ("*National Citizens*"); *Bilingual Bicultural Coalition*

3. We require more of broadcasters and cable entities in this *Report and Order*, however, than merely refraining from discrimination. We require them to reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sectors of their communities. We believe that repeated hiring without broad outreach may unfairly exclude minority and women job candidates when minorities and women are poorly represented in an employer's staff -- particularly when they are poorly represented in the ranks of management employees who make hiring decisions. It is not enough to say that one will not discriminate against anyone who applies for a job when not all have been given a fair opportunity to apply. Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process.

4. These goals would be sufficient in themselves to warrant nondiscrimination and outreach requirements. We believe that such requirements also serve an important, constructive function in fostering greater diversity of viewpoints and programming that is responsive to the interests of a diverse community. As discussed below, we harbor no illusion that members of any group share the same outlook or views. But we do believe that the record in this proceeding and human experience suggest that, if the group of people who make programming decisions at a broadcast station or cable system come from a wider variety of backgrounds with a greater range of human experience and social interactions, their programming decisions will better reflect the diversity of viewpoints in our pluralistic society than would programming decisions made by a homogenous workforce. And we hope and believe that, given

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on Mass Media, Inc. v. FCC, 595 U.S. 621, 628, 633-35 (D.C. Cir. 1978) (*en banc*) ("*Bilingual*").

the power and pervasiveness of the electronic media in our nation, programming that reflects the diverse views and interests present in our society will increase our understanding of those from different backgrounds, decrease the sense of isolation of minority groups, and help us build bridges across racial, ethnic and socioeconomic divides. We have no doubt that regulations that advance these goals would "encourage the larger and more effective use of radio in the public interest."[9]

II. SUMMARY

5. The *Report and Order* addresses the concerns of the Lutheran Church court regarding the Commission's authority to promulgate an employment nondiscrimination rule. In the *Report and Order*, we confirm the existence of such authority and retain the anti-discrimination provisions of the broadcast and cable EEO rules. The *Report and Order* also discusses the statutory bases for the Commission's authority to promulgate EEO program requirements and describes the regulatory approach that we are adopting towards religious radio broadcasters.

6. The *Report and Order* reinstates the requirement that broadcasters file annual employment reports (Form 395-B), which was suspended by the Commission following *Lutheran Church*, and retains the requirement that cable entities file annual employment reports (Form 395-A or 395-M).[10] The Commission will no longer use the employment profile data in the annual employment reports in screening renewal applications or assessing compliance with EEO program

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[9] 47 U.S.C. § 303(g).

[10] The annual employment reporting requirement for cable entities was not suspended following *Lutheran Church*.

requirements. The Commission will use this information only to monitor industry employment trends and report to Congress.

7. The EEO program requirements adopted in the *Report and Order* require that broadcasters and cable entities widely disseminate information about job openings to ensure that all qualified applicants, including minorities and women, are able to compete for jobs in the broadcast and cable industries. The requirements afford broadcasters and cable entities flexibility in designing their EEO programs while, at the same time, ensuring broad dissemination of information concerning every full-time vacancy, as well as effective enforcement of our EEO rules and policies. To enhance the success of their outreach, broadcasters and cable entities are also required to implement two supplemental recruitment measures: (i) notification of job vacancies to any recruitment organization that requests such notification; and (ii) a certain number of outreach efforts beyond the traditional recruitment that occurs in response to individual vacancies, such as job fairs, internship programs, training programs, mentoring programs, and interaction with educational and community groups.

8. Although all broadcasters and cable entities will be required to widely disseminate information concerning job openings, they may choose not to use the supplemental recruitment measures if they believe that they can accomplish broad outreach without them. However, a broadcaster or cable entity who makes this election will be required to maintain records concerning the recruitment sources, race, ethnicity and gender of applicants so it can monitor whether its outreach efforts have been successful in achieving broad outreach to the community. If the data collected indicates that outreach has not been inclusive, a broadcaster or cable entity will be expected to adjust its outreach program accordingly. Thus, the rules we are adopting require a broadcaster of cable entity to analyze the

effectiveness of its outreach program, and address any problems found.

9. As in the past, broadcast station employment units with fewer than five full-time employees and cable employment units with fewer than six full-time employees will not be required to demonstrate compliance with the EEO program requirements. However, all other broadcasters and cable entities must file annually an EEO report in their public file, detailing their outreach efforts during the preceding year and the results of those efforts. Broadcasters also will be required to file a Certificate of Compliance every second, fourth and sixth year of the license term certifying compliance with the EEO Rule. Television stations and every radio station that is part of an employment unit with more than ten full-time employees will be required to file a copy of their EEO public file report midway through the license term with the FCC. This information will be analyzed as part of the Commission's mid-term review of a station's EEO program. Stations will also be required to file their EEO public file report with their renewal application and cable entities will be required to file their EEO public file report as part of the supplemental information required by statute to be filed every five years.

III. BACKGROUND

10. The Commission, in the *Notice of Proposed Rule Making*[11] in this proceeding, proposed EEO outreach requirements that would be consistent with the decision

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[11] 13 FCC Rcd 23004 (1998) (hereinafter *NPRM*). We note that several comments and reply comments were late-filed in this proceeding. However, because we believe that it is in the public interest to do so, we will consider these comments and reply comments as part of the record of this proceeding.

rendered in *Lutheran Church*.[12] The Court of Appeals held that the portions of the Commission's regulations requiring licensees to maintain an EEO program to recruit minorities were subject to the strict scrutiny applicable to racial classifications imposed by the federal government under *Adarand Constructors, Inc. v. Pena*.[13] The court further held those requirements unconstitutional as applied to minorities.[14] The court opined that this regulatory scheme "pressures stations to maintain a work force that mirrors the racial breakdown of their 'metropolitan statistical area,'"[15] and thus injects racial considerations into hiring decisions. The court did not find that a station would be held in violation of the Commission's rules based solely on a statistical disparity between its employment profile and the percentage of minorities in the local labor force. However, it concluded that the requirement that stations evaluate the success of their EEO programs based on those statistics, in conjunction with the Commission's use of those statistics at renewal time, compelled licensees "to hire with an eye toward meeting the numerical target," and thus resulted in individuals being granted a preference because of their race.[16] In addition, while the court did not question the constitutionality of the Commission's anti-discrimination rule, it remanded to the Commission the question of its statutory

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[12] See *NPRM*, 13 FCC Rcd at 23008-23011 (paras. 11-17) for further discussion of *Lutheran Church*.

[13] 515 U.S. 200, 115 S. Ct. 2097 (1995) ("*Adarand*").

[14] The court declined to evaluate the constitutionality of the EEO program requirements as applied to women, since the issue was not before it. *Lutheran Church*, 141 F.3d at 351, n.9.

[15] *Id.* at 352.

[16] *Id.* at 354.

authority to promulgate such a rule.[17] The *NPRM* tentatively concluded that we have ample statutory authority to retain our EEO anti-discrimination rule,[18] and we elaborate further on this view below.

11. On September 15, 1998, the court denied the Commission's petition for rehearing en banc.[19] In doing so, the court issued a supplemental decision in which it indicated that its initial decision in the case should not be read to hold that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny. The court also observed that not all race conscious measures adopted by the government are subject to strict scrutiny.[20]

12. Against that backdrop, the Commission sought comment on numerous proposals and issues regarding changes to its broadcast EEO Rule and conforming changes to its cable EEO rules. Although the *Lutheran Church* decision did not directly affect cable entities, the Commission's cable EEO rules contain some of the same provisions that the court invalidated in *Lutheran Church*; therefore, to avoid possible constitutional problems, as well as to emphasize broad and inclusive recruitment outreach, we proposed new EEO provisions for both broadcasters and cable entities, including MVPDs.[21]

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[17] *Id.* at 356-357.

[18] *NPRM*, 13 FCC Rcd at 23014 (para. 25).

[19] *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (1998).

[20] *Id.* at 492.

[21] *See* 47 C.F.R. § 76.71 *et seq.*

13. In the *NPRM*, the Commission tentatively proposed EEO rules which removed all requirements that broadcast licensees and cable entities compare their employment profile with the local labor force. In addition, the Commission indicated that it would no longer compare individual broadcast licensees' or cable entities' employment profiles with the local labor force, even as a screening device. We proposed to retain the cable and broadcasting rules' general EEO policy/program requirements as outlined in 47 C.F.R. §§ 76.73(b) and 73.2080(b), respectively. Further, we proposed to retain most of the cable and broadcasting rules' specific EEO program requirements.[22]

14. The *NPRM* proposed several alternative recruitment approaches with the objective of ensuring the broadest dissemination of vacancy information. We asked generally for comments on ways the Commission could encourage entities to expand their pools of qualified applicants without creating any incentives to prefer minority and female applicants over other applicants.

15. Further, the *NPRM* proposed that entities be required to analyze their efforts to recruit, hire and promote in a nondiscriminatory fashion and address any difficulties in

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[22] These require broadcasters and cable entities to: disseminate their equal employment opportunity program to job applicants and employees; review seniority practices to ensure that such practices are not discriminatory; examine rates of pay and fringe benefits for employees and eliminate any inequities based upon race or sex discrimination; offer promotions to qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility; cooperate with any labor union in the development of programs to assure qualified minority persons or women of equal opportunity for employment; include a nondiscrimination clause in union agreements; and avoid the use of selection techniques or tests that have the effect of discriminating against qualified women and minorities. *NPRM*, 13 FCC Rcd at 23039.

implementing their EEO programs. We solicited comments on how this analysis should be conducted.

16. The *NPRM* stimulated response from a broad range of commenters, who raised exceptional and thought-provoking ideas and proposals. Having reviewed the entire record in this proceeding, we have constructed a new EEO outreach program which we believe will accomplish our goal of ensuring broad outreach in recruitment while avoiding the constitutional infirmities identified by the court in *Lutheran Church* and reducing recordkeeping burdens to the extent consistent with maintaining an effective, enforceable program.

IV. DISCUSSION

A. Statutory Authority for EEO Program Requirements and Anti-Discrimination Rules

1. Section 634: Explicit Authority to Regulate EEO Practices of Cable Entities, Including Multichannel Video Programming Distributors

17. We noted in the *NPRM* that the court's decision in *Lutheran Church* did not address the validity of our EEO rules for cable entities, which were not at issue in that case.[23] We tentatively concluded that we have ample statutory authority under Section 634 of the Communications Act for the continued enforcement of the cable EEO rules.[24] Indeed, we noted that Section 634 requires us to enforce EEO rules for cable entities. Nevertheless, because certain provisions in the cable EEO rules are similar to those provisions in the broadcast EEO Rule found to be unconstitutional in *Lutheran Church*, we sought comment

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[23] *NPRM*, 13 FCC Rcd at 23022 (para. 46). See 47 C.F.R. §§ 76.71 *et seq.*

[24] 47 U.S.C. § 554.

on whether the Commission has statutory authority to modify those rules to avoid constitutional problems.

18. We conclude that the Commission is required by Section 634 to enforce EEO rules for the cable industry, but that we have considerable latitude under the statute to revise the cable EEO rules. Congress built into Section 634 flexibility for the Commission to implement the regulatory scheme by granting the Commission rulemaking authority rather than simply prescribing the cable EEO requirements by statute; by stating in Section 634(d)(2) that the "rules shall specify the terms under which" an entity shall take the actions specified in that section;[25] and by providing in Section 634(d)(4) that the Commission may amend the cable EEO rules "from time to time to the extent necessary to carry out the provisions of this section." We believe that our broad rulemaking authority under Section 634(d)(2) and 634(d)(4) permits us to adopt new, race-neutral, inclusive outreach requirements and to revise the annual employment reports (Forms 395-A and 395-M) and Supplemental Investigation Sheets ("SIS" or "SIS forms") filed by cable entities to make them consistent with our modified cable EEO rules. Commenters agree that Section 634 explicitly authorizes the Commission to modify its cable EEO regulations to advance the congressional goals identified in the statute.[26]

19. Additionally, by stating in Section 634(d)(2) that the Commission is to adopt rules implementing the requirements of that section "to the extent possible," Congress recognized that it may not be possible for the Commission to fully implement all of the provisions in that section. Thus, it only obligated the

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[25] In contrast, Section 634(c) simply provides that cable entities "shall" comply with five listed requirements in implementing their EEO programs.

[26] Tele-Communications, Inc. (TCI) Comments at 3 (owner of cable systems); Cole, Raywid and Braverman (CRB) Comments at 2-3.

Commission to implement the listed requirements "to the extent possible," consistent with other conflicting requirements or limitations. The court's decision in *Lutheran Church* delineates constitutional limitations with which we must reconcile the cable EEO rules. We believe that Section 634(d)(2) permits the Commission to eliminate those provisions of the cable EEO rules that are similar to those struck down by the court in *Lutheran Church* because it is not "possible" for the Commission to enforce a provision that a court has found unconstitutional. Accordingly, we modify the cable EEO rules in this *Report and Order* to remove provisions similar to those found unconstitutional in *Lutheran Church*. We also revise the annual employment reports and SIS forms filed by cable entities to conform them with our modified cable EEO rules.

2. Broadcasters

20. The court specifically directed us in *Lutheran Church* to consider our authority to promulgate an employment nondiscrimination rule. Further, while the court struck down the broadcast EEO program requirements on constitutional grounds and did not hold that we lack statutory authority to promulgate such rules, it questioned our reliance on our public interest mandate to foster diversity of programming as a basis for the broadcast EEO Rule. Accordingly, we discuss here our statutory authority to retain our anti-discrimination rule and to adopt new EEO outreach requirements for broadcasters.

21. Based on the record in this proceeding, we have concluded that we have ample statutory authority to retain our EEO anti-discrimination rule and, consistent with the constitutional standards established in *Lutheran Church*, to promulgate new EEO outreach requirements. First, Congress has explicitly authorized us to regulate the EEO practices of television broadcasters and ratified the Commission's authority to adopt EEO rules for radio broadcasters. Second, we have authority to adopt rules fostering equal employment in the

broadcast industry in order to further the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services, reflected in Section 309(j) of the Communications Act. Finally, equal employment of minorities and women furthers the public interest goal of diversity of programming, both directly and by enhancing the prospects for minority and female ownership.

a. Section 334: Explicit Authority to Regulate EEO Practices of Television Broadcasters

22. In 1992, Congress enacted Section 334 of the Communications Act as part of the Cable Television Consumer Protection and Competition Act of 1992.[27] Section 634 provides that "the Commission shall not revise:"

> (1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or
>
> (2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.[28]

The Conference Report accompanying this legislation indicates that Section 634 "codifies the Commission's equal employment opportunity rules, 47 C.F.R. 73.2080" for television licensees and permittees.[29] Section 334 thus grants the Commission explicit authority to regulate the EEO practices of television broadcasters. Indeed, it *requires* the Commission regulate the EEO practices of television broadcasters. Thus, as is the case with respect to cable operators and other multichannel

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[27] Pub. L. No. 192-385, 106 Stat. 1460 ("1992 Cable Act").

[28] 47 U.S.C. § 334(a).

[29] Conf. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992).

programming distributors, the Commission has express statutory authority to regulate the EEO practices of television broadcasters.

b. Congressional Ratification

23. We noted in the NPRM that the Commission has maintained nondiscrimination and EEO program requirements for broadcasters for over 30 years. In 1968, the Commission adopted a Memorandum Opinion and Order in which it concluded that the national policy against discrimination and the fact that broadcasters are licensed under the Communications Act to operate in the public interest required the Commission to consider allegations of employment discrimination in licensing broadcast stations.[30] The Commission expressed its view that deliberate discrimination in employment is inconsistent with a broadcaster's responsibility to serve all elements of its community.[31] In 1969, the Commission adopted rules prohibiting broadcast stations from discriminating against any person in employment on the basis of race, color, religion, or national origin, and requiring stations to maintain a program designed to assure equal opportunity in every aspect of station employment.[32] It reiterated its view that discriminatory employment practices are incompatible with a station's obligation to operate in the public interest, and relied on Sections 4(i), 303, 307, 308, 309 and 310 in adopting the new rules. Relying on its authority to license and regulate broadcasters in the public interest, the Commission

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[30] *See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC 2d 766 (1968).

[31] *Id.* at 770.

[32] *See Petition for Rulemaking to Require Broadcast Licensees to Sh[illegible] Nondiscrimination in Their Employment Practices*, 18 FCC 2d 240 (196[illegible]

has revised and extended its rules on numerous occasions since 1969 to, inter alia, refine its EEO program requirements, require licensees to file these programs and other statistical employment information with the Commission, and prohibit discrimination against, and require outreach to, women.[33]

24. Over the last 30 years, the Commission has vigorously enforced its EEO requirements, sanctioning broadcast licensees in numerous cases for failing to comply fully with those requirements. Commission decisions enforcing the EEO requirements have been challenged both by licensees who have been sanctioned for noncompliance[34] and by petitioners who believed that Commission enforcement was not vigorous enough.[35] Indeed, the Court of Appeals for the D.C. Circuit held

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[33] *See, e.g., Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 FCC 2d 430 (1970); Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340, *and 342, and Adding the Equal Employment Program Filing Requirement to Commission Rules 73.125, 73.301, 73.599, 73.680, and 73.793*, 32 FCC 2d 708 (1971); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226 (1976) ("1976 *Report and Order*"). *See also Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978) [delineating the Commission's investigative jurisdiction and methods of cooperation with the Equal Employment Opportunity Commission ("EEOC")].

[34] *See, e.g., San Luis Obispo Broadcasting Ltd. Partnership*, 13 FCC Rcd 1020 (1998); *Valley Television, Inc.*, 12 FCC Rcd 22795 (1998); *Congaree Broadcasting, Inc.*, 5 FCC Rcd 7691 (1990); *South Plains Broadcasting Company, Inc.*, 101 FCC 2d 1364 (1985).

[35] *See, e.g., Davidson County Broadcasting Company, Inc.*, 12 FCC Rcd 12245 (1997); *Broadcast Associates, Inc.*, 11 FCC Rcd 15479 (1996); *Buckley Broadcasting Corp.*, 11 FCC Rcd 6628 (1996); *Lanser Broadcasting Corp.*, 10 FCC Rcd 12121 (1995); *Ogden Broadcasting of South Carolina, Inc.*, 7 FCC Rcd 1895 (1992).

more than 20 years ago that the Commission must investigate broadcasters' employment practices and, in assessing the character qualifications of broadcast licensees, consider whether they have engaged in intentional employment discrimination.[36] And the Supreme Court observed in the seminal case addressing the scope of an agency's authority to serve the "public interest" that FCC regulation of the employment practices of its licensees "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."[37]

25. We observed in the NPRM that during the three decades that the Commission has administered EEO program requirements and antidiscrimination rules, Congress has repeatedly expressed awareness of the rules and has not only acquiesced in them, but has also referred to them approvingly, confirming our view that the Commission has statutory authority to promulgate these rules. We continue to believe that Congress has ratified the Commission's authority to adopt and enforce EEO requirements against broadcasters under its statutory mandate to license and regulate broadcasters in the public interest.[38]

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[36] *Bilingual*, 595 F.2d at 628-29 ("In implementing its anti-discrimination policy, the Commission of necessity must investigate broadcasters' past employment practices. A documented pattern of intentional discrimination would put seriously into question a licensee's character qualification to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship.").

[37] *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

[38] We note that while Congressional ratification applies equally to radio and television broadcasters -- which have been subject to the same EEO rules for the last 30 years -- it is relevant only to radio broadcasters since Congress enacted Section 334 of the Act, which, as discussed above, *expressly*

26. There is a substantial body of case law establishing the principle that congressional approval and ratification of administrative interpretations of statutory provisions, including those granting jurisdiction to regulate, can be inferred from congressional acquiescence in a long-standing agency policy or practice.[39] The inference of ratification from congressional acquiescence in the Commission's exercise of authority to adopt and enforce EEO regulations is particularly strong. As noted above, the Commission has consistently taken the position over a very long period of time -- 30 years -- that it has authority under its public interest mandate to adopt and enforce EEO rules, and the obligations arising under those rules have become a major component of broadcasters' obligation to serve the public interest.[40] Moreover, as noted above, the Commission

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authorizes the Commission to regulate the EEO practices of television broadcasters.

[39] *See, e.g., Haig v. Agee*, 453 U.S. 280, 300-06 (1981) ("*Haig*") (long-standing interpretation by the Secretary of State of its power under Passport Act of 1926 as encompassing the power to revoke passports to prevent damage to national security or foreign policy was ratified by congressional acquiescence, even though Secretary exercised power infrequently); *Lorillard v. Pons*, 434 U.S. 575, 580-85 (1978) ("*Lorillard*") (Congress is presumed to be aware of administrative and judicial interpretations of a statute and to adopt and ratify those interpretations when it re-enacts a statute without change or incorporates in a new law sections of a prior law that have a settled interpretation); *Zemel v. Rusk*, 381 U.S. 1, 9-13 (1965) ("*Zemel*") (Secretary of State's interpretation of Passport Act of 1926 as authorizing him to impose area restrictions was ratified by Congress when it left untouched the Secretary's broad rulemaking authority when it later enacted legislation relating to passports); *Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 313-15 (1933) ("administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful").

[40] *See, e.g.*, 1969 *Report and Order*, 18 FCC 2d at 241-42; 1976 *Report and Order*, 60 FCC 2d at 229; *Report*, 9 FCC Rcd at 6285-87.

has enforced its regulations vigorously. These are not obscure agency rules that could have gone unnoticed by Congress.

27. But congressional ratification of the Commission's authority to adopt EEO rules need not be inferred solely from congressional acquiescence in the Commission's exercise of that authority over a period of many years. Congress has, in two major pieces of legislation, *expressly* approved and ratified the Commission's authority to regulate the EEO practices of its broadcast licensees and other media entities as well.

28. In 1984, Congress enacted Section 634 of the Communications Act[41] as part of the Cable Communications Policy Act of 1984.[42] Although the Commission at that time already had rules in place regulating the EEO practices of cable operators as well as broadcasters, Section 634 was intended to "codify and strengthen[] the Commission's existing equal employment opportunity regulations."[43] Section 634 granted the Commission broad authority to adopt rules banning employment discrimination by cable operators and requiring cable operators to "establish, maintain, and execute a positive continuing program of specific practices designed to ensure

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[41] 47 U.S.C. § 554.

[42] Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Cable Act").

[43] H.R. Rep. No. 934, 98th Cong., 2d Sess. 86 (1984), *reprinted in* [1984] U.S. Cong. News 4655. The Senate bill that was ultimately enacted, S. 66, did not contain EEO provisions. The EEO provisions that were eventually enacted as Section 634 originated in Section 635 of H.R. 4103, which is explained in H.R. Report No. 934, discussed below. The Senate adopted the explanation of H.R. 4103 contained in H.R. Report No. 934. *See* 130 C.R. S.14285 (Oct. 11, 1985), *reprinted in* [1984] U.S. Cong. News 4738.

equal opportunity in every aspect of its employment policies and practices ...."[44]

29. The legislative history of Section 634 makes it unmistakably clear that Congress believed that the Commission already possessed authority to regulate the EEO practices of mass media entities -- broadcast as well as cable. The House Commerce Committee Report on the bill proposing the provisions on which Section 634 was based explicitly confirmed the Commission's authority to adopt EEO rules. The House Commerce Committee stated:

> *It is well established that the Commission has the authority to regulate employment practices in the communications industry.* Among the Commission's efforts in the equal employment opportunity (EEO) area over the last several years has been the enforcement of employment standards in the cable industry.

Section 634 endorses and extends those standards.

> Because of the potentially large impact cable programming and other services provided by the cable industry has on the public, the employment practices of the industry have an importance greater than that suggested by the number of its employees. The committee strongly believes that *equal employment requirements are particularly important in the mass media area* where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.[45]

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[44] 47 U.S.C. § 554(b), (c), (d).

[45] H.R. Rep. No. 934, 98th Cong., 2d Sess. 84-85 (1984) (emphasis added).

30. In addition to the explicit recognition of the Commission's broad and "well established" authority to regulate employment practices in the communications industry, the legislative history of Section 634 shows that Congress viewed the legislation as codifying, strengthening and building upon the Commission's pre-existing regulatory scheme, which it viewed as well within the Commission's statutory authority. For example, the House Report states that the legislation "codifies and strengthens the Commission's existing equal employment opportunity regulations."[46] Further, it states that the statutory definition of the entities that are subject to the EEO requirements "endorses the Commission's current practice of reviewing compliance with EEO standards by cable systems and other employment units with more than 5 employees, and extends the applicability of EEO requirements to headquarters operations."[47] Similarly, it states that the provisions specifying the requirements for Commission EEO rules "conform in large part to the Commission's required EEO program under existing regulations."[48] Clearly, Congress recognized and ratified the Commission's broad authority to regulate the EEO practices of mass media entities.

31. Additional evidence of congressional ratification can be found in the Cable Television Consumer Protection and Competition Act of 1992,[49] which further strengthened the cable EEO requirements, extended those requirements to all MVPDs, and codified the Commission's EEO program and nondiscrimination requirements as applied to broadcast

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[46] *Id.* at 86.

[47] *Id.*

[48] *Id.* at 87.

[49] Pub. L. No. 192-385, 106 Stat. 1460.

television licensees. In so doing, Congress confirmed the importance of EEO rules for the electronic media generally. Moreover, Congress once again explicitly acknowledged the existence of the Commission's broadcast and cable EEO requirements and proclaimed that vigorous enforcement of those rules was necessary. Section 22(a) of the 1992 Cable Act provides:

> (1) *despite the existence of regulations governing equal employment opportunity*, females and minorities are not employed in significant numbers in positions of management authority in the *cable and broadcast television industries*;
>
> (2) increased numbers of females and minorities in positions of management authority in the *cable and broadcast television industries* advances the Nation's policy favoring diversity in the expression of views in the electronic media; and
>
> (3) rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.[50]

By extending the cable EEO requirements to every entity that provides multiple channels of video programming, such as MMDS operators and DBS licensees, Congress was building upon, and filling in the gaps in, the Commission's regulatory scheme, ensuring that *every* electronic mass media provider would be subject to EEO regulations enforced by the Commission.

32. As noted above, the 1992 Cable Act not only strengthened and extended the cable EEO requirements, it also

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[50] 1992 Cable Act, Section 22(a) (emphasis added). *See also* H.R. Rep. No. 628, 102d Cong., 2d Sess. 111-17 (1992).

codified the Commission's EEO requirements for broadcast television stations in Section 334 of the Act.[31] Section 334 thus explicitly recognizes the existence of the Commission's broadcast EEO Rule and requires the Commission to keep its EEO requirements in effect for television broadcasters.

33. Furthermore, Section 22(g) of the 1992 Cable Act required the Commission to report to Congress on "the effectiveness of [the Commission's] procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority." The Commission was required to include in that report "such legislative recommendations to improve equal employment opportunity in the broadcasting and cable industries as it deems necessary." We do not believe that Congress would have directed the Commission to review the effectiveness of its broadcast and cable EEO policies and regulations then in effect, and recommend whether further legislative action was necessary, had Congress not believed that those policies and regulations were within the Commission's lawful authority.[32] Thus, Section 22(g) is further evidence of Congress' affirmative approval of the Commission's authority to adopt equal employment opportunity requirements for broadcasters.[33]

34. It is within this historical context that the Commission's statutory authority to regulate the EEO practices of broadcast

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[31] 47 U.S.C. § 334. *See also* Conf. Rep. No. 862, 102d, 2d Sess 97 (1992).

[32] We note that the Commission's EEO rules for broadcasters apply to radio as well as television stations.

[33] *See, e.g., Bob Jones University v. United States*, 461 U.S. 574 (1983) ("*Bob Jones University*").

licensees must be viewed. As discussed above, the Supreme Court has inferred congressional ratification of administrative action from "nothing more than silence in the face of an administrative policy."[54] Here, the inference of congressional ratification rests on far firmer ground, including explicit statements confirming the Commission's authority to regulate the EEO practices of media companies and legislation that codified and expanded the reach of Commission EEO regulations.[55] Under these circumstances, the inference of congressional ratification is inescapable.[56]

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[54] *Haig*, 453 U.S. at 300, citing *Zemel*, 381 U.S. at 11 and other Supreme Court cases.

[55] The facts here give rise to an even stronger inference of congressional ratification than was present in *City of New York v. FCC*, 486 U.S. 57 (1988), for example. In that case, cable television franchisors challenged the Commission's authority, in adopting regulations establishing cable signal quality technical standards, to forbid state and local authorities to impose more stringent technical standards. In determining that the Commission acted within its statutory authority in preempting state and local standards, the Supreme Court found that Congress in the Cable Act of 1984 endorsed the Commission's longstanding policy of federal preemption of cable technical standards, and that it was "quite significant" that there was no evidence of any intent by Congress to "overturn the Commission's decade-old policy without any discussion or even any suggestion that it was doing so." *Id.* at 67-68. In the case of the Commission's jurisdiction to regulate in the EEO area, there is affirmative evidence of congressional approval of the Commission's statutory authority.

[56] *See, e.g., City of New York v. FCC*, supra; *Bob Jones University*, 461 U.S. at 601 (finding that "Congress affirmatively manifested its acquiescence" in the IRS' statutory interpretation that educational institutions that discriminate on the basis of race are not eligible for an income tax exemption when it enacted a new provision denying tax-exempt status to social clubs that discriminate on the basis of race); *U.S. v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) ("once an agency's statutory construction has been fully brought to the attention of the public and the Congress and the latter has not sought to alter that interpretation although it has amended the

35. Notably, despite voluminous comments filed in this proceeding, only one commenter challenges the Commission's position that its statutory authority to regulate the EEO practices of broadcasters has been ratified by Congress. Evening Post Company and Great Empire Broadcasting, Inc. (Evening Post) argues that Congress has not ratified the Commission's authority to regulate EEO practices of broadcasters because: (i) Section 334 of the Communications Act is framed in negative terms and thus limits, rather than expands, the Commission's authority; and (ii) Section 334 of the Communications Act was enacted by the 1992 Cable Act, thus somehow diminishing the import of the findings in Section 22(a) of the Cable Act regarding the need for EEO regulation of cable and broadcast television. Evening Post also asserts that "it could be argued" that Congress' grant to the Commission of explicit authority to adopt rules for cable and multichannel video program distributors indicates that it did not intend that the Commission would have statutory authority to regulate EEO practices in the broadcast industry.[57]

36. Evening Post's argument is belied by both the facts and the law. As a general matter, we note first that Evening Post fails to acknowledge congressional acquiescence in the

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statute in other respects, then presumably the legislative intent has been correctly discerned"), *quoting Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-89 (1940); *Lorillard*, 434 U.S. at 580 (where Congress adopted a new law incorporating sections of a prior law, it can be presumed to have had knowledge of and approved the interpretation given to the prior law); *Zemel*, 381 U.S. at 12 (Congress ratified Secretary of State's authority to refuse to impose area restrictions on travel when "despite 26 years of executive interpretation of the 1926 Act as authorizing the imposition of area restrictions, Congress in 1952, though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act.").

[57] Evening Post Comments at 4-6.

Commission's exercise of its jurisdiction to regulate EEO practices of broadcasters for the past 30 years. More specifically, though it is true that Section 334 is drafted in negative terms, that provision requires the Commission, in substance, to continue applying to television broadcasters the EEO rules that were in effect when Section 334 was enacted. Indeed, the Conference Report on the 1992 Cable Act makes it clear that this was Congress' intent.[58] However drafted, we cannot see how this provision can be viewed as anything other than an endorsement of the Commission's authority to regulate the EEO practices of broadcast television licensees and a directive that it continue to do so.[59] Further, we fail to see how

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[58] *See* H.R. Rep. No. 862, 102d Cong., 2d Sess 97 (1992) (section 334 "codifies the Commission's equal employment opportunity rules").

[59] Smithwick and Belendiuk (S&B) argues that Section 334 forbids the Commission from changing its EEO program requirements. *See* S&B Comments at 12-15 (law firm representing over 300 broadcast stations). We disagree. As discussed above, while Section 334 is drafted as a prohibition, it requires in essence that the Commission continue applying to television broadcasters the EEO Rule that was in effect on September 1, 1992. Thus, Congress clearly intended that the FCC enforce equal employment obligations against broadcasters. While the Commission cannot continue to enforce those portions of the 1992 EEO Rule that were invalidated on constitutional grounds, the Commission can most faithfully advance the congressional intent underlying Section 334 by adopting new outreach rules to replace those that were invalidated. Section 334 is unlike the statute at issue in *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) ("*MCI*"), cited by S&B. *See* S&B Comments at 13. In MCI, the D.C. Circuit found that the Commission lacked authority to prohibit non-dominant common carriers of interstate telephone service from filing tariffs. The court found that Section 203(a) of the Communications Act explicitly requires the filing of tariffs, and that the Commission's authority to "modify" this requirement pursuant to another statutory provision does not authorize it to forbid the filing of tariffs. There was no indication that Congress intended to relieve common carriers of the tariff-filing obligation, and there was unambiguous language requiring statutory filing, *Id.* at 1192.

the fact that Section 334 of the Communications Act was enacted by the 1992 Cable Act in any way diminishes the import of the findings in Section 22(a) of the Cable Act. On the contrary, it makes even clearer their relevance to the Commission's authority to regulate broadcasters.

37. Evening Post's final argument -- that Congress' explicit grant to the Commission of authority to regulate the EEO practices of cable entities and other MVPDs in the 1992 Act indicates that it "did not intend for the Commission to have statutory authority to take action on broadcast EEO matters" -- is specious and is directly contradicted by the legislative histories of the 1984 and 1992 Cable Acts. Evening Post's argument might have some force if the original Communications Act of 1934 had granted the Commission authority to regulate the EEO practices of certain specified entities but not the EEO practices of broadcasters. One could then argue that the omission of authority to regulate broadcasters' EEO practices was intentional. But Congress was not writing on a blank slate when it granted the Commission explicit statutory authority to regulate cable EEO practices in 1984 and expanded that authority in 1992 to include all MVPDs. As discussed above, it *knew* at that time that the Commission had been regulating the EEO practices of broadcast licensees since 1969 and it explicitly *acknowledged* the Commission's statutory authority to do so. As the large body

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Here, in contrast, Congress clearly intended that the Commission impose equal employment opportunity obligations on broadcasters. Indeed, Congress found the need for such requirements so compelling that it forbade the Commission from revising its EEO rules then in effect. Moreover, in *MCI*, the Commission's abandonment of its tariff requirement reflected a shift in the Commission's previous view of the statutory tariff-filing obligation. *Id.* at 1192-93. Here, the Commission has consistently, since 1969, interpreted its statutory authority as permitting the imposition of EEO requirements on broadcasters, and Congress has acquiesced in, and ratified, that view.

of case law cited above establishes, Congress would have had to affirmatively indicate its *disapproval* of the Commission's longstanding, consistent and vigorous exercise of its authority to regulate the EEO practices of broadcasters in order to avoid the inference of congressional ratification. It did the opposite, recognizing the Commission's "well-established" authority and indicating that its intent was to endorse and strengthen the Commission's EEO regulations. The legislative record thus belies Evening Post's suggestion that Congress did not intend the Commission to have statutory authority to regulate broadcast EEO practices.

38. There is another, particularly compelling reason to find in the current statutory context that Congress has ratified our authority to regulate the EEO practices of broadcasters. In resolving issues of administrative or judicial jurisdiction, the Supreme Court has held that any interpretation of congressional intent that will result in a "bizarre jurisdictional patchwork" is to be disfavored absent legislative history or a persuasive functional argument to the contrary.[60] In this case, Congress has *explicitly* granted the Commission authority to regulate the EEO practices of television broadcasters, cable entities, and all other MVPDs, including such relative newcomers as DBS and MMDS operators.[61] Thus, rejecting the inference of congressional ratification would leave us in the anomalous situation of having jurisdiction to regulate the EEO practices of broadcast television and cable television providers and MVPDs, but *not* radio broadcasters. There is no indication in the legislative history that this was Congress' intent. On the contrary, Congress has indicated its belief that Commission enforcement of EEO rules for the electronic media is essential

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[60] *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 799 (1985); *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 (1980).

[61] 47 U.S.C. §§ 334, 554.

and, building upon the foundation established by the Commission's broadcast EEO Rule, Congress enacted legislation to ensure that *every* medium of mass communication is subject to such rules. It would defeat that clear congressional intent and create a "bizarre jurisdictional patchwork" for us to hold that we lack statutory authority to enforce EEO rules against radio stations -- the oldest and arguably the most pervasive of the electronic media.

39. For the foregoing reasons, we find that Congress has granted us explicit authority to regulate the EEO practices of television licensees and has ratified our authority to regulate the EEO practices of radio licensees. Whatever uncertainty may have existed 30 years ago concerning whether the Commission's public interest mandate was broad enough to authorize EEO regulation has now been resolved by congressional acquiescence and both tacit and explicit congressional approval.

40. Although we sought and received extensive public comment on the nexus between EEO regulation and our public interest mandate to foster diversity of programming, we have concluded that resolution of that issue is not dispositive, in and of itself, of our statutory authority for two reasons. First, as discussed above, Congressional ratification provides an independent basis for our authority. Second, it is clear from reviewing the 1984 and 1992 Cable Acts and their legislative histories that Congress's purpose in granting us authority to regulate the EEO practices of video providers and in ratifying our authority to regulate the EEO practices of broadcasters was partly but not solely to foster diversity of programming. Congress endorsed recruitment and nondiscrimination requirements for two distinct purposes: to foster diverse programming by increasing the number of women and minorities in positions that have an impact on programming decisions, *and* to deter racial and gender discrimination. Both

are set forth as express purposes of the cable EEO rule amendments enacted in 1992. As noted above, Congress stated that EEO rules both "advance[] the Nation's policy favoring diversity in the expression of views in the electronic media" and are "required in order to effectively deter racial and gender discrimination."[62] Congress plainly thought it important to increase the number of minorities and women in upper-level positions in order to further the national policy favoring the expression of diverse views and perspectives in the electronic media.[63] But it is also clear that Congress did not limit the EEO requirements to upper-level positions. Section 634(d)(1) required the Commission to amend its cable EEO rules, including its recruitment rules, to "promote equality of employment opportunities for females and minorities in each of the job categories itemized" in section 634(d)(3). Those include *all* categories of employment, including such categories as "semiskilled operatives" and "unskilled laborers" that appear to have no direct influence on programming.[64] Similarly, the broadcast EEO Rule that Section 334 codified applied to all categories of employment, not just management or program-related positions. We believe that Congress required us to adopt and enforce EEO program requirements with respect to all job

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[62] 1992 Cable Act, Section 22(a). See also H.R. No. 102-628, 102d Cong., 2nd Sess. 111-12 (1992) ("The Committee finds that continued rigorous enforcement of equal employment opportunity rules and regulations is required in order to deter effectively racial and gender discrimination.").

[63] *See* 1992 Cable Act, Section 22(a)(2) ("increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media...").

[64] The 1984 Cable Act required the Commission to adopt EEO requirements for job categories ranging from officials and managers to lower-level positions such as unskilled laborers and service workers. In the 1992 Cable Act, Congress expanded the number of those job categories from nine to 15.

categories, including lower-level jobs, because word-of-mouth recruitment practices may be inherently discriminatory when minorities and women are poorly represented on an employer's staff -- particularly when they are scarce in the management ranks where hiring decisions are made. Outreach in recruitment, as well as a nondiscrimination requirement, is necessary to deter discrimination in such circumstances so that the homogenous workforce does not simply replicate itself.

41. Since Congress clearly intends that we apply recruitment and other EEO requirements to *all* job categories in order to deter discrimination, we have concluded that we should apply our new EEO requirements to all job categories even if we were to conclude that some of those categories have no impact on programming decisions. Therefore, we conclude that whether there is a nexus between EEO regulation for all job categories and our public interest mandate to foster diversity of programming is not dispositive of our statutory authority. We nevertheless address in the following sections the nexus between our EEO rules and our statutory mandates to foster diversity of programming and minority ownership because we believe that the rules we adopt today further, and thus find additional statutory support in, those mandates.

c. Section 309(j)

42. In the *NPRM*, we observed that Section 309(j) of the Communications Act establishes a congressional policy favoring the dissemination of licenses among a wide variety of applicants, including members of minority groups and women, as part of a broad policy of fostering economic opportunity.[65] Section 309(j), as amended in 1997, requires the Commission to award all commercial broadcast licenses for which mutually exclusive applications are filed (except for initial digital

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[65] *NPRM*, 13 FCC Rcd at 23017-18 (paras. 36-37).

television applications) by competitive bidding.[66] In implementing the competitive bidding requirements, the Commission must: promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women ....[67] Additionally, the Commission must promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," and ensure that those entities "are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures ...."[68]

43. We tentatively concluded in the *NPRM* that Section 309(j) provides statutory authority to implement new EEO rules because the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services would be furthered by nondiscrimination and outreach requirements, which are designed to foster equal employment opportunities for minorities and women in the broadcast industry.[69] We stated our belief that employment in the broadcasting industry provides minorities and women with the

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[66] 47 U.S.C. § 309(j), as amended by Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

[67] 47 U.S.C. § 309(j)(3).

[68] 47 U.S.C. § 309(j)(4).

[69] *NPRM*, 13 FCC Rcd at 23018 (paras. 37-38).

skills needed to acquire and operate a broadcast station and may help them in becoming aware of ownership opportunities. Such employment may also facilitate their acquisition of capital needed to purchase a broadcast station, as financing sources are generally more willing to work with borrowers that have a track record in the business they seek to own and operate. Furthermore, we noted that we have previously concluded that there is a link between the policies furthered by our EEO rules and the fostering of ownership by minorities and women.[70] We also noted that Congress appears to have concluded that such a link exists. In codifying the cable EEO requirements in 1984, the House Commerce Committee asserted that "a strong EEO policy is necessary to assure that there are sufficient numbers of minorities and women with professional and management level experience within the cable industry, so that there are significant numbers of minorities and women with the background and training to take advantage of existing and future cable system ownership opportunities."[71] We asked

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[70] *See, e.g., Report*, 9 FCC Rcd at 6319 (noting that "management positions ... are often stepping stones to ownership."); *Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 8097 (1994) ("EEO rules for commercial mobile radio service (CMRS) providers are appropriate and necessary to achieve the statutory goal of increased ownership opportunities for minorities and women in spectrum-based services. By having EEO rules that apply to all CMRS providers provide increased communications experience for minorities and women. This experience will, in turn, enable them more easily to become owners of communications enterprises.").

[71] H.R. Rep. No. 934, 98th Cong., 2d Sess. at 84-85 (1984). Congress reiterated this position when it passed the 1992 Cable Act, declaring that "a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future television broadcasting ownership opportunities." H.R. Rep. No. 628,

commenters to submit evidence establishing the nexus between employment opportunities for minorities and women and ownership opportunities.

44. After considering the comments received in response to the *NPRM*, we conclude that Section 309(j) provides statutory authority to implement new EEO rules. We disagree with commenters who maintain that our reliance on Section 309(j) is misplaced because it relates to the use of competitive bidding for commercial broadcast licenses.[72] As we pointed out in the *NPRM*, the reference in Section 309(j) to tax certificates, a preferential tax treatment available upon the sale of broadcast stations and cable systems to minorities, suggests that Congress did not intend to limit the Commission's authority under Section 309(j) to measures directly associated with the competitive bidding process.

45. Moreover, we believe that there is a strong nexus between employment of minorities and females and ownership opportunities. Numerous commenters support this view.[73] MMTC asserts that employment opportunities help minorities

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102d Cong., 2d Sess. at 114 (1992).

[72] National Association of Broadcasters (NAB) Comments at 18; Evening Post Comments at 6.

[73] *See e.g.*, Minority Media and Telecommunications Council and 29 other organizations (MMTC) Comments at 169; American Women in Radio and Television (AWRT) Comments at 7 (a national, non-profit organization of professional women and men who work in radio, television, cable, advertising and related fields); National Hispanic Foundation for the Arts (NHFA) Comments at 6-10 (non-profit organization whose mission is to improve the image of Latinos in this country by developing a better perception of Latinos in the entertainment industry); NOW Foundation and five other organizations (NOW) Comments at 8-11; U.S. Small Business Administration (SBA) Comments at 1.

obtain the skills needed to become owners.[74] AWRT states that increasing the number and type of employment opportunities available for women and minorities will increase the number of women and minorities who seek ownership opportunities because training and experience are "critical elements" in deciding to seek ownership of broadcast and cable facilities.[75] AWRT also states that an informal survey of its membership reveals that those members who are, or have been, owners of broadcast facilities had significant prior experience working in the industry and view their employment experiences as integral to both their decision to move up to ownership and their success as an owner.[76] According to NOW, the connection between management experience and ownership opportunities is "fundamental."[77] NOW posits that "women and minorities have a particular need for broadcast experience because they typically must be more qualified than their White male counterparts in order to find financial backing. Under-capitalization poses one of the most significant obstacles to women and minorities hoping to purchase mass media outlets."[78]

46. Commenters also cite the experiences of broadcast station owners and provide affidavits from numerous broadcast station owners as evidence of the nexus between employment

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[74] MMTC Comments at 169.

[75] AWRT Comments at 7.

[76] *Id.*

[77] NOW Comments at 8.

[78] *Id.* at 10.

and ownership opportunities.[79] Many of these owners describe how they or their colleagues started in entry-level or even internship positions and worked their way up the ladder to management positions and then to ownership.[80] In addition, many of the owners attest that employment opportunities provide minorities and women with the skills and training needed to acquire and successfully operate stations;[81] that lack of access to capital is one of the greatest impediments to broadcast station ownership by minorities and women;[82] and

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[79] *See, e.g.*, NOW Comments at 12 (citing the experiences of Cathy Hughes, CEO of Radio One, and Joseph Rey, the principal investor in Rainbow Broadcasting Ltd., as evidence of the nexus between employment opportunities for women and minorities and ownership opportunities); NHFA Comments at 6-11 and Testimony of Nely Galan (citing the experience of Nely Galan, President of Entertainment at Telemundo Network Group, LLC, as evidence that a strong nexus exists between hiring minorities and women and promoting ownership opportunities for these groups); MMTC Comments, Vol. III, Exhibits 1, 2, 3, 6, 8, 9, 10, 11, 12, 17, 19, 20, 21 and 22.

[80] MMTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 3 (Declaration of W. Don Cornwell), 8 (Declaration of Serena Ferguson Mann), 9 (Declaration of Skip Finley), 10 (Declaration of Ragan A. Henry), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey), 19 (Declaration of Rokia Smith) and 20 (Declaration of Jeffrey H. Smulyan).

[81] MMTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 2 (Declaration of Thomas Castro), 10 (Declaration of Ragan A. Henry), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey), 17 (Declaration of Russell Perry), 21 (Declaration of Dennis Swanson) and 22 (Declaration of James L. Winston); NHFA Comments, Testimony of Nely Galan.

[82] MMTC Comments, Vol. III, Exhibits 6 (Declaration of Willie D. Davis), 10 (Declaration of Ragan A. Henry), 12 (Declaration of Chesley Maddox-Dorsey), 17 (Declaration of Russell Perry) and 22 (Declaration of James L. Winston).

that broadcast experience, particularly management experience, is essential for minorities and women to secure financing to acquire stations.[83] Further, a number of the station owners express concern that, without any EEO outreach requirements, minorities and women will not have the opportunity to obtain the training and experience needed to move up to station ownership.[84]

47. NAB rejects this evidence as "irrelevant or anecdotal at best."[85] However, NAB does not explain why it believes that this evidence is irrelevant, nor does it explain why it thinks that the Commission should disregard anecdotal evidence from an array of individuals with extensive experience in the broadcast industry.[86] Another commenter argues that the proposed

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[83] MMTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 6 (Declaration of Willie D. Davis), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey) and 21 (Declaration of Dennis Swanson).

[84] MMTC Comments, Vol. III, Exhibits 2 (Declaration of Thomas Castro), 6 (Declaration of Willie D. Davis), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey) and 17 (Declaration of Russell Perry).

[85] NAB Reply Comments at 2.

[86] *See Mausolf v. Babbit*, 125 F.3d 661, 667-70 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 2366 (1998) ("*Mausolf*") (regulations promulgated by an agency will be upheld if they are reasonably related to the purposes of the enabling legislation; under rational basis test of 5 U.S.C § 706(2)(A), snowmobiling restrictions were rationally based on biological opinions finding possible adverse impact of snowmobiling on gray wolf population and on anecdotal evidence in record of harassment of gray wolves). *Cf. Schliefer v. City of Charlottesville*, 159 F.3d 843, 849, 850 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 1252 (1999) ("*Schliefer*") (In the First Amendment context, where government must demonstrate that the recited harms are real, not merely conjectural and that the regulation will in fact alleviate these harms in a direct and material way, the standard "has never required

broadcast EEO Rule rests upon the unsupported assumption that "all broadcast employees are on a lifetime broadcast career track, from entry level through programming and management ranks to ownership."[87] This commenter asserts that many employees in fact leave broadcast stations to go to work for nonbroadcast employers[88] and cites numerous examples of minority and female employees who left broadcasting to pursue other careers.[89] This argument misses the point. It is not necessary to find that all minority and female employees, or even a majority of minority and female employees, move up through the ranks to ownership in order to establish a nexus between minority and female employment and ownership opportunities. Rather, we think it is sufficient that the employment of minorities and women in the broadcast industry greatly enhances the opportunities for minorities and women to own broadcast stations and that, without such employment, ownership opportunities for minorities and women will be diminished. Based on the record, we conclude that this is the case.

d. Public Interest Mandate to Promote Programming Diversity

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scientific or statistical 'proof' of the wisdom of the legislature's chosen course;" anecdotal evidence cited by the court).

[87] Haley Bader & Potts (HBP) Comments at 21 (law firm representing owners of 30 radio stations).

[88] *Id.*

[89] HBP Comments, Declaration of Harold W. Gore at 2; Declaration of John J. Sowada at 2; Declaration of Eric F. Brown at 2; Declaration of Louis H. Burton, Jr. at 2; Declaration of Mike Boen at 2; Declaration of Dave Vagle at 2

48. An additional statutory basis for new EEO rules is grounded in the Commission's authority to regulate broadcasting to serve the public interest and promote diversity of programming.[90] The Commission has broad authority under the Communications Act to regulate and license broadcasters as the public convenience, interest, or necessity requires.[91]

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[90] We discussed this statutory basis in the *NPRM*, 13 FCC Rcd at 23019-22 (paras. 39-45).

[91] This authority is based on several provisions of the Act. For example, Section 301 of the Act provides that no person can transmit radio signals in the U.S. except under a license granted by the Commission. 47 U.S.C. § 301. Section 303 authorizes the Commission to license and regulate use of the radio spectrum "as public convenience, interest, or necessity requires," to "generally encourage the larger and more effective use of radio in the public interest," and to enact regulations to carry out the provisions of the Act. 47 U.S.C. § 303(f), (g), and (r). The Supreme Court has held that Section 303(r) confers authority on the Commission to issue regulations codifying its view of the public interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable. *National Citizens*, 436 U.S. at 793. Section 307 directs the Commission to grant and renew station licenses "if public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a), (b). Section 309 directs the Commission to determine whether the "public interest, convenience, and necessity will be served" by the grant of applications for licenses, license modifications, or license renewals. 47 U.S.C. § 309(a). Section 310(d) imposes the same standard on the grant of assignment and transfer applications. *See* 47 U.S.C. § 310(d). The 1996 Act modified the procedures for processing broadcast renewal applications and refined the standard to be applied by the Commission in determining whether to grant renewal applications. Prior to enactment of the 1996 Act, the grant of renewal applications was controlled by the general "public interest, convenience, and necessity" standard set forth in Section 309(a). As amended in 1996, the Communications Act directs the Commission to grant a broadcast renewal application if it finds, with respect to the station at issue, that the licensee has served the public interest, convenience, and necessity; the licensee has not committed any serious violations of the Act or the FCC's rules; and the licensee has not committed a series of violations of the Act or rules that constitute a pattern of abuse. 47 U.S.C. § 309(k). The

Moreover, Congress amended Section 1 of the Communications Act in 1996 to make it clear that the Commission's mandate is to regulate interstate and foreign communications services so that they are "available, so far as possible, to all people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex* ...."[92] This recent amendment, which applies to all entities subject to the Communications Act,[93] amplifies the Commission's general public interest mandate to ensure that broadcasting and other programming services serve the needs and interests of all sectors of the community, and indicates more specifically that such services shall be provided to all Americans without discrimination on the basis of race or any other suspect classification. Further, in Section 257(b) of the Communications Act,[94] Congress specifically identifies "diversity of media voices" as one of the "policies and purposes" of the Communications Act.

49. A broadcaster can more effectively fulfill the needs of its community, and therefore serve the public interest, when it provides equal employment opportunity to all applicants and employees regardless of race, ethnic origin, color, or religion. Such a program furthers one of the Commission's main objectives, to promote diverse programming -- programming that airs different points of view and reflects the needs and

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1996 amendment thus makes it clear that the public interest standard is broader in scope than compliance with specific provisions of the Communications Act or the Commission's Rules.

[92] 47 U.S.C. § 151, as amended (1997) (emphasis added) (italicized clause added by the 1996 Act).

[93] H.R. Rep. 104-458, 104th Cong., 2d Sess. at 143.

[94] 47 U.S.C. § 257(b).

interests of all sectors of the community, including minorities and women. As the Commission stated in *Streamlining and the NPRM*, we do not assume that minority and female employment will always result in minority and female-oriented programming. Nor do we believe that all minorities or all women share the same viewpoints.[95] Nonetheless, we believe that, as more minorities and women are employed in the broadcast industry, it is more likely that varying perspectives will be aired and that programming will be oriented to serve more diverse interests and needs than would be the case if stations employed few minorities and women.[96]

50. Congress has recognized the nexus between diversity of employment and diversity of programming, as evidenced by the legislative history of the Cable Television Consumer Protection and Competition Act of 1992, where it noted that: The Committee believes now, as it did in 1984, that increased equal employment opportunities (EEO) for women and minorities, particularly in decision-making and managerial positions, '... is a crucial means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.'[97]

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[95] *NPRM*, 13 FCC Rcd at 23020 (para. 41).

[96] *NPRM*, 13 FCC Rcd at 23020 (para. 41), *citing Streamlining*, 11 FCC Rcd at 5155-56. According to Office of Communication, Inc, United Church of Christ and seven other organizations (UCC), social science studies indicate that "race is relevant to viewpoint." Comments of UCC, Appendix at 24 n.80. UCC also cited a study conducted by the American Bar Association Journal and the National Bar Association Magazine that indicates differing perceptions of Black and White lawyers on the fairness of the judicial system as applied to Blacks. *Id.*

[97] H. R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992), *quoting*, H. R. Rep. No. 934, 98th Cong., 2d Sess. 85 (1984). *Accord*, H. R. Rep. No. 628, 102d Cong., 2d Sess. 114 (1992): The Courts and the Commission have

51. Moreover, the Supreme Court has recognized that the FCC has statutory authority to regulate the employment practices of its licensees as a way of fostering diversity of viewpoints in programming. Such regulation, the Court stated, "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."[98] In addition, in *Metro Broadcasting, Inc. v. FCC*,[99] the Supreme Court held that two minority ownership policies -- the award of an "enhancement" for minority ownership in comparative proceedings for new broadcast licenses and the minority "distress sale" policy -- were substantially related to the important governmental objective of "enhancing broadcast diversity," and thus survived an intermediate level of equal protection scrutiny. Although the *Adarand* decision reversed *Metro Broadcasting* to the extent that *Metro Broadcasting* held that federal racial classifications

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consistently recognized the increasing amount of programming designed to address the needs and interests of minorities and women is fundamentally related to the number of minority and women employees in the upper-level positions within media companies. In addition, the Committee recognizes that a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future television broadcasting ownership opportunities.

[98] *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976) [*citing Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) ("*Office of Communication*")]. *Cf. National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (FCC has authority under its public interest mandate to regulate anti-competitive practices of broadcast networks that prevented networks or licensees from making the fullest use of radio in the public interest).

[99] 497 U.S. 547 (1990).

are subject to a less rigorous standard of scrutiny than state racial classifications, it did not alter the recognition that the Commission's statutory mandate includes fostering a diversity of views in the broadcast service.[100]

52. Contrary to the views expressed by some commenters, recognizing that there is a nexus between diversity of employment and diversity of programming does not amount to stereotyping. As the Court noted in *Metro Broadcasting*, with respect to the minority ownership policies at issue in that case: The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete 'minority viewpoint' on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled 'minority programming' or that programming that might be described as 'minority' does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.[101] The Court added: While we

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[100] According to the Court: "Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission. We have observed that the 'public interest' standard necessarily invites reference to First Amendment principles." *Metro Broadcasting*, 497 U.S. at 567, *quoting National Citizens Committee*, 436 U.S. at 795 and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973).

[101] *Metro Broadcasting*, 497 U.S. at 579.

are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves.[102]

53. Thus, it is well established under *NAACP v. FPC, Metro Broadcasting* and Supreme Court decisions that preceded them, that fostering diversity of viewpoints is a goal encompassed by the Commission's public interest mandate.[103] Indeed, "it has long been a basic tenet of national communications policy" that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[104] The Court has noted that the benefits of diversity

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[102] *Id.* at 582.

[103] *See, e.g., National Citizens Committee*, 436 U.S. at 795-800; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). *See also Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983), which held that the FCC did not abuse its discretion when it declined to impose a greater obligation to provide special programming for the hearing impaired on a noncommercial licensee than a commercial licensee, even though the Rehabilitation Act of 1973 applies to the former but not the latter. The Court stated that the FCC cannot permit licensees to ignore the needs of particular groups within the viewing public, but held that the FCC's duty to enforce this obligation derives from the Communications Act, not other federal statutes. Thus, the Supreme Court acknowledged that the Commission's public interest mandate permits and perhaps requires it to determine whether its licensees are providing diverse programming to all sectors of its community. *See* Comments of UCC, Appendix at 23 and cases cited therein.

[104] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27) [*quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945)].

are not limited to minorities but, rather, redound to all viewers and listeners.[105]

54. The courts have also recognized that there is a nexus between the identity of media owners and employees and diversity of programming. The minority ownership policies at issue in *Metro Broadcasting* withstood intermediate scrutiny because the Court found they were "substantially related" to the statutory goal of promoting diversity of information and viewpoints on the air waves.[106] Accordingly, the Court affirmed the FCC's judgment that there is a nexus between rules fostering minority ownership of broadcast stations and the statutory goal of fostering diversity of viewpoints.[107] Further, in *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, the D.C. Circuit recognized the Commission's authority to enforce both employment "affirmative action" and anti-discrimination rules in the license renewal context to advance its public interest mandate to foster diverse programming. The court held that the Commission had abused its discretion by unconditionally renewing a broadcast license where a substantial question of fact had been raised regarding whether the licensee had engaged in employment discrimination.[108]

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[105] *Metro Broadcasting*, 497 U.S. at 568.

[106] *Metro Broadcasting*, 497 U.S. at 569-600. *Cf. National Citizens Committee*, 436 U.S. at 793-802 (recognizing nexus between diversity of ownership generally and diversity of viewpoints and upholding FCC's broad authority to foster diversity of ownership).

[107] The Court noted that Congress had recognized the nexus between diversity of ownership and diversity of programming. *Metro Broadcasting*, 497 U.S. at 578-79.

[108] *Bilingual*, 595 F.2d at 628, 633-35. *See also National Organization for Women, New York Chapter v. FCC*, 555 F.2d 1002, 1017-19 (D.C. Cir. 1977); *Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59

55. In *Lutheran Church*, the court concluded that the Commission's broadcast EEO program requirements were not narrowly tailored to advance the stated interest in diversity because the requirements applied to low-level positions that lack influence over programming. In the *NPRM*, we stated our belief that program content is not determined solely by the individuals at the station with authority to select programming, but may also be influenced by interaction between these individuals and other station employees, which exposes the former to views and perspectives of the latter. We also noted that low-level positions provide a way for individuals with little or no communications experience, including minorities and women, to enter the broadcast and cable industries. This, in turn, could lead to higher-level positions of greater responsibility that could affect programming and/or provide the experience desired by financial institutions to finance ownership in the broadcast and cable industries.[109] We sought comment on these issues.[110]

56. NAB and broadcasters question whether a nexus exists between employment of minorities and ownership opportunities. NAB asserts that the Commission has offered no evidence to support the existence of such a nexus.[111] In addition, these commenters question whether there is a nexus between

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(D.C. Cir. 1977) (per curiam).

[109] *NPRM*, 13 FCC Rcd at 23021-22 (para. 44).

[110] *NPRM*, 13 FCC Rcd at 23022 (para. 45).

[111] NAB Comments at 18; NAB Reply Comments at 2. Institute for Justice (Institute) also argues that the Commission offers no evidence to support its view that increased employment of minorities and women will increase diverse programming. Institute Comments at 9 (public interest law firm whose mission includes advancing the civil rights of citizens).

minority and female employment and diverse programming.[112] NAB notes that the court in *Lamprecht v. FCC*,[113] found the female ownership preference policy unconstitutional because it found no statistically meaningful link between ownership by women and programming of any particular kind, based on the evidence before it.[114] According to the court, the only available study, upon which it relied heavily, showed that stations owned primarily by women are just one and a quarter times as likely to broadcast programming targeted at female audiences as are

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[112] NAB Reply Comments at 2; Camrory Comments at 5; HBP Comments at 6, 20; Delta Radio, Inc. and 11 other broadcasters (Delta Radio) Comments at 11; 46 Named State Broadcast Associations (46 Named StBAs) Comments at 13; 46 Named StBAs Reply Comments at 12-14. HBP supplies declarations from its broadcast clients attesting to this conclusion and to the respondents' inability "to provide an example of a programming decision that was influenced by the race or gender of a station staff member, whether or not the staff person was in a position to influence programming." *Id.* at 20. Camrory, HBP and S&B also reject the notion that lower-level employees influence program content. Camrory Comments at 5; S&B Comments at 19; HBP Comments at 21. Camrory argues, however, that a nexus between minority and female employment and diverse programming need not be shown in order to justify the Commission's EEO programs. According to Camrory, formats are selected based on audience demographics, which also affect hiring decisions. Camrory notes that it is not arguing that "the race or gender of a station employee -- high or lower level -- may not help shape a station's non-entertainment programming. Thus, since news and public affairs programming is a very important public interest component of overall station operations, diverse employment may well contribute to a Commission-favored diversity of viewpoint at least as to non-entertainment programming." Camrory Comments at 5-6. Camrory also concedes that "minority managers managing minority-owned stations (for example, an Hispanic-owned, Spanish language radio station) are much more attuned to the Hispanic community than are general market stations." Camrory Comments at 6.

[113] 958 F.2d 382 (D.C. Cir. 1992)

[114] NAB Comments at 20, *citing Lamprecht*, 958 F.2d at 398.

stations owned primarily by men.[115] NAB also argues, citing *Lutheran Church*, that the Commission has failed to define "what it means by diverse programming," and that the *Lutheran Church* court questioned whether "intrastation" diversity is an important interest.[116]

57. In contrast, a variety of commenters believes there is a nexus between employment opportunities and diverse programming[117] and that the Commission has authority to impose equal employment opportunity obligations to foster

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[115] *Lamprecht*, 958 F.2d at 397. By contrast, the court found that stations owned primarily by Indians or Alaskans are more than eleven times as likely to broadcast "Indian or Alaskan programming" as are stations with no Indian or Alaskan owners, while the multiplier for Asians or Pacific Islanders is more than eight, for Hispanics more than seven, for Blacks, almost four. *Id.* The Court did not define women's programming. It noted that the Supreme Court in Metro Broadcasting had assumed that there is such a thing as "minority programming," and it, in turn, assumed the same with respect to "women's programming" and other distinct programming types. *Id.* at 395 and 395 n.4. It also noted that the study it cited did not define terms such as "women's programming" or "minority programming" but relied instead on the reporting stations to characterize themselves. *Id.* at 396 n.8.

[116] NAB Comments at 21-22.

[117] American Federation of Radio and Television Artists (AFTRA) Comments at 6 (national labor organization representing 80,000 performers in news, entertainment, advertising and sound recording industries); AWRT Comments at 6; MMTC Comments at 148-49; UCC Comments at 13-14; NOW Comments at 12-20; NOW Reply Comments at 17-18; NHFA Comments at 6. NOW argues that the EEO rules have resulted in increased employment of women and minorities between 1971 and 1997 (with the percentage of women nearly doubling from 23.3% to 40.8% and the percentage of minorities more than doubling from 9.1% to 19%) and a consequent increase in program diversity. NOW Reply Comments at 19.

diverse programming as part of our public interest mandate.[118] AFTRA concludes based on its experience administering hundreds of collective bargaining agreements with television and radio stations across the country that a nexus between employment of minorities and females at all levels and program diversity does exist. AFTRA notes that, while it cannot be said that program diversity at those stations results solely from the employment of minorities and females, it is its experience that these employees have considerable influence over programming. It adds that it represents a varied array of broadcast employees, including production assistants, writers, reporters and anchors, all of whom exert considerable influence over the production of programming.[119]

58. A number of commenters provide anecdotal or other evidence to show that there is a nexus between employment of minorities and women and program diversity. For example, Cathy A. Hughes states that "When we start seeing women in management positions, then we start getting coverage on breast cancer, premature child birth, and issues that are of interest to the overwhelming majority of women;" Paula Madison states that "Diversity plays an important role in how program decisions are made at News Channel 14....At every point in [the process of developing news stories], there is a diverse group of people making the decisions, and the role of race in any of our stories is discussed regularly and openly throughout our staff;" and Dennis Swanson states "I believe that having a diversified staff at the department head level has helped WNBC be more conscientious towards a wider range of programming and news views. Our news director is an African-American woman, and our station relations director is a Latina woman. Both exert

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[118] NOW Comments at 4; Lawyers Committee for Civil Rights Under Law Comments at 3-4.

[119] AFTRA Comments at 6.

strong influences on our station's on-air content. In addition, minority news reporters, such as Ti Hua Chang, raise our level of sensitivity to minority communities."[120] The evidence suggests that employment of women and minorities at lower levels also promotes diversity because lower-level employees are sometimes promoted to higher levels.[121] Some commenters furnish affidavits illustrating that entry level positions may be stepping stones to higher-level positions that have a clear

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[120] MMTC Comments, Volume III, Exhibits 11, 14, 21. *See also* MMTC Comments, Volume III, Exhibits 2, 3, 7, 10: Declarations of Thomas Castro ("There is a direct linkage between integrating the work force and the product that goes on the air. . . . An interracial media staff is necessary to tell a facet of great stories that, otherwise, may never be told."); W. Don Cornwell (tie between employment diversity and program diversity); William H. Dilday ("An integrated workforce also works in more direct ways by increasing the availability of employees who can cover minority issues, know what questions to ask, and put a much more balanced story on the air." Black manager at station resulted in more balanced coverage with respect to sports at local Black colleges); Ragan A. Henry ("Minorities in the media will likely serve to broaden the view of managers on their community's perspectives."); Testimony of Nely Galan, NHFA Comments; NOW Comments at 14-20; UCC Comments at 14.

[121] MMTC Comments, Volume III, Exhibit 3: Declaration of W. Don Cornwell (virtually all managers at his broadcasting company got their start in entry level positions). See NOW Reply Comments at 18 ("employees at all levels have the power to influence programming."). AWRT asserts: "The individuals who hold lower-level positions are the ready pool of people available for internal training and promotion. In some cases, the best means to obtain the requisite experience to hold a position of greater influence, or to understand enough about the business to know what experience is necessary, is by working up from entry level positions." AWRT Comments at 6. NOW agrees, noting that employees of diverse backgrounds bring different perspectives into the workplace that may influence the otherwise narrow programming choices of decision-makers and that lower-level jobs are also a stepping stone to upper-level employment. NOW cites several examples of upper-level employees who started as secretaries. NOW Comments at 18-19.

impact on programming.[122] While NAB dismisses this evidence as anecdotal or irrelevant,[123] it does not explain why it is not relevant. We believe that we can rely in part on anecdotal evidence to establish a nexus between employment opportunity and diverse programming.[124] We believe that such reliance is particularly justified where the nexus is not easily susceptible to statistical proof because it is impossible to establish from empirical evidence the connection between programming decisions and the backgrounds of the decisionmakers.

59. The comments also indicate that there is an indirect nexus between employment opportunities and diverse programming because employment opportunities are linked to ownership opportunities and increased minority and female ownership leads to increased diversity of programming.[125] We have already discussed the record evidence of the nexus between employment opportunity and ownership. The comments also indicate that there is a nexus between diversification of ownership and diversity of programming. A number of commenters cite an econometric study by Jeff Dubin

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[122] MMTC Comments, Volume III, Exhibits 4 (Declaration of Veronica Cruz), 9 (Declaration of Skip Finley), 10 (Declaration of Ragan A. Henry), 21 (Declaration of Dennis Swanson); NHFA Comments at 12 & Testimony of Nely Galan.

[123] NAB Reply Comments at 2.

[124] *See Mausolf, supra; Schliefer, supra.*

[125] UCC Comments at 13-14; UCC Appendix at 25-26; NOW Comments at 3, 8-9; NHFA Comments at 6, 11 and Testimony of Nely Galan; MMTC cites a 1990 survey of twenty Black broadcast station owners "which found that 50% of the owners had prior broadcasting experience before they purchased their first station." MMTC Comments at 169, *citing* A. Evans, *Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry*, 8 Yale Law and Policy Review 380, 391-92 (1990).

and Matthew L. Spitzer that concludes that "increasing the number of minority-owned broadcasting stations increases the amount of minority-oriented programming."[126] This study, based on data compiled from a 1987 survey of radio stations conducted by the FCC, concludes: To sum up the test of our hypotheses, then, we have seen that minority ownership has a distinct and significant impact on minority programming, even after we control for the composition of minorities in the marketplace. Programming does also respond to composition of minorities in the marketplace. The magnitude of the coefficients for Black ownership on Black programming and Hispanic ownership on Spanish programming are significantly larger than the coefficient for female ownership on female programming. We also see, however, that a greater degree of female ownership leads to increases in programming targeted to several other minority groups. Stations with female ownership are more likely to program primarily for females, but are also more likely to increase programming for Blacks, Hispanics, Asians, and American Indians. The combined effects are similar in magnitude to those for the minority group owners taken separately. To increase Black programming, it may be most effective to increase the number of Black owners. To increase minority programming, it would be at least as effective to increase the number of female owners. We did not find that increasing the number of radio stations in a market increased the amount of minority programming, but we did find that radio stations may be using the presence of other stations in the market that program for minorities as a signal to guide the stations in their programming choices. As the percentage of other stations programming for a given minority group increases, the likelihood that the respondent's station will

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[126] Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. Cal. L. Rev. 841 (1995).

program for that minority group increases as well.[127] Thus, this study suggests that increasing minority ownership leads to increases in programming directed primarily to members of minority groups. Therefore, contrary to views expressed by some commenters, market demographics do not appear to be the sole determinant of programming.

60. Further empirical evidence for the proposition that "minority ownership increases the net amount of minority-targeted programming" is found in a recent, as yet unpublished, study by Peter Siegelman and Joel Waldfogel.[128] Siegelman and Waldfogel "show that Black and White (and Hispanic/Anglo) preferences in radio programming are substantially different."[129] Their research and analysis also suggests that "minority ownership increases the net amount of minority-targeted programming. Even though most minority-targeted stations are White-owned, markets with more minority-owned stations also have more minority-*targeted* stations, which means that minority-owned stations add to the total programming available to minority listeners."[130]

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[127] *Id.* at 869-72.

[128] Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities, Peter Siegelman & Joel Waldfogel, mimeo. 27, The Wharton School, January 1999.

[129] *Id.* at 2. According to Siegelman and Waldfogel, "we find very little overlap in listenership -- by and large, Blacks listen to Black format stations, Whites listen to White format stations, Hispanics to Hispanic format stations." *Id.* at 13. Just over half of Black listening is concentrated in only two formats, Black and Black/Adult Contemporary, which account for less than 2.5% of non-Black listening. *Id.* at 13-14. This study uses a list of 43 formats from Duncan's American Radio, Spring 1993 and 1997. Listening data is from Arbitron's Radio USA, Spring 1993 and 1997.

[130] *Id.* at 27.

61. FCC staff analysis using the BIA MasterAccess data also indicates that minority-owned stations program differently, on the whole, from non-minority-owned stations. Over 78% of all minority-owned stations have Urban, Spanish, and Religion formats, compared with only 21% of stations in other small-station groups and 15% of stations in large station-groups.

62. Based on the foregoing, we believe that equal employment opportunities for minorities and women further the public interest goal of diversity of programming, both directly and also indirectly by promoting minority and female ownership. Accordingly, we believe that the governmental interest in fostering diversity of programming provides additional authority for reinstituting EEO rules.

3. Annual Employment Reports

63. We tentatively concluded in the *NPRM* that we have authority to require broadcasters and cable entities to file annual employment reports to enable us to monitor industry employment trends.[131] We observed that the court in *Lutheran Church* did not conclude that the Commission lacks authority to collect statistical employment data to analyze industry employment trends or to prepare our annual broadcast and cable employment trend reports. Further, we noted that the Commission has broad authority under the Communications

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[131] *NPRM*, 13 FCC Rcd at 23022 (para. 47). On September 30, 1998, the Commission suspended the requirement for broadcast licensees and permittees to file annual employment reports (Form 395-B) until further notice while it considers the adoption of new EEO rules that address the concerns of the court in *Lutheran Church* and makes any appropriate changes to its data collection procedures. *See Suspension of Requirement for Filing of Broadcast Station Annual Employment Reports and Program Reports*, 13 FCC Rcd 21998 (1998) ("*Suspension Order*"). The annual employment reporting requirements for cable entities have remained in effect.

Act to collect information and prepare reports.[132] We also noted that the Commission is required by statute to collect employment data for the broadcast television and cable industries.[133]

64. Although some commenters raised constitutional concerns, as discussed above, regarding the potential use of this data by the Commission and others, none of the commenters challenged our tentative conclusion that we have authority to collect the data.[134] We conclude that we have authority under the statutory provisions cited above to require broadcasters and cable entities to file annual employment reports to enable us to monitor industry employment trends. We continue to believe that knowledge of these industry trends will assist us in evaluating the effectiveness of, and continued need for, our EEO rules, and in making appropriate recommendations to Congress for legislative change. We note that the legislative history of the 1992 Cable Act indicates that Congress relied on the Commission's employment trend reports in concluding that women and minorities continue to be underrepresented in policy and decision making positions in the cable industry and that modifications of the cable EEO rules were necessary.[135] Moreover, as discussed above, we do not believe that the filing of annual employment reports will impermissibly pressure broadcasters or cable entities to adopt racial or gender

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[132] *See, e.g.*, 47 U.S.C. §§ 154(k) (annual report to Congress); 308(b); 403.

[133] *See* 47 U.S.C. §§ 334(a)(2) and 554(d)(3).

[134] *See* AFTRA Comments at 7; Camrory Comments at 7-8; NHFA Comments at 15; NOW Comments at 28-29; SBA Comments at 1.

[135] *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992). B. Broadcast and Cable EEO Rules, Policies, and Forms 1. Anti-Discrimination Provisions

preferences in hiring because the data in the annual employment reports will not be used for screening renewal applications or considered in assessing compliance with our EEO requirements.

B. Broadcast and Cable EEO Rules, Policies and Forms

1. Anti-Discrimination Provisions

65. In the *NPRM*, we proposed to retain our prohibition against employment discrimination.[136] In addition, we proposed to continue our longstanding policy of deferring action on individual complaints of employment discrimination against broadcasters and cable entities pending final action by the EEOC or other government agencies and/or courts established to enforce nondiscrimination laws. We stated, however, that we would retain the discretion to consider allegations of discrimination prior to a final determination by the EEOC or a court where the facts so warrant. We also requested comment on whether to require that the Commission be contemporaneously notified of discrimination complaints filed with the EEOC or a court.

66. Several commenters directly support our retention of the prohibition against employment discrimination.[137] Other commenters, without addressing the issue directly, demonstrate their support for a nondiscrimination requirement implicitly through their comments and proposals.[138] We conclude that we

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[136] *NPRM*, 13 FCC Rcd at 23025 (para. 59).

[137] NAB Comments at 5; 46 Named StBAs Comments at 30; NHFA Comments at 15-16; Curators of the University of Missouri (Curators) Comments at 8 (licensee of one Missouri Television station several Missouri radio stations); Fisher Broadcasting, Inc. (Fisher) Reply Comments at 12 (licensee of broadcast stations in Washington and Oregon).

[138] *See e.g.*, MMTC Comments at 275-332; National Cable Television Association (NCTA) Comments at 15-16 (an association serving and

should retain our prohibition against employment discrimination. As discussed above, the Commission has statutory authority to prohibit discrimination by broadcasters and cable entities and, in the case of broadcast television licensees and permittees and cable entities, is *required* to do so.[139] Moreover, we believe that a finding that a broadcaster has engaged in employment discrimination would raise a serious question as to its character qualifications to be a Commission licensee and to fulfill its statutory obligation to provide broadcast service "to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex..."[140] We would have no confidence that an entity that has discriminated against job applicants or employees based on race, ethnicity, or gender would serve the needs and interests of its entire community of license in a nondiscriminatory fashion.

67. We also agree with those commenters who state that we should generally defer action on individual discrimination complaints against broadcasters and cable entities pending final action by the EEOC or a court of competent jurisdiction, consistent with the policy articulated in *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 51 Fed. Reg. 21798 (1986) ("MOU").[141] As we

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representing the cable industry); NOW Comments at 29-30; UCC Comments at 10 n.23.

[139] 47 U.S.C. §§ 334 and 554.

[140] 47 U.S.C. § 151.

[141] NAB Comments at 15; 46 Named StBAs Comments at 30; Curators Comments at 8; S&B Comments at 25; Delta Radio Comments at ii; Fisher Reply Comments at 12.

noted in the NPRM, the policy set forth in the MOU was developed primarily because Congress intended the EEOC to be principally responsible for the resolution of employment discrimination disputes and efforts on our part to separately resolve such disputes would result in unnecessary duplication. Furthermore, as several commenters observe, the EEOC has substantial expertise in adjudicating employment discrimination complaints.[142] Thus, we will continue to forward individual discrimination complaints received at the Commission to the EEOC for processing. In addition, we will continue to take cognizance of any final determinations of employment discrimination in licensing decisions.

68. We are unpersuaded by MMTC's argument that the Commission should repeal its policy of generally declining to review individual allegations of discrimination against broadcasters pending a finding of discrimination by the EEOC or a court.[143] MMTC asserts that this policy effectively immunizes discriminators from Commission review because discrimination cases against broadcasters rarely result in a final order.[144] MMTC claims that, even in cases where the EEOC or court has found that a broadcaster has discriminated, the broadcaster can avoid Commission review of the discrimination charge by offering the complainant a nominal sum in excess of the amount of the verdict in exchange for the complainant's

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[142] 46 Named StBAs Comments at 31-32; Curators Comments at 8-9.

[143] MMTC Comments at 324-25.

[144] *Id.* at 326. According to MMTC, discrimination cases against broadcasters rarely result in a final order because broadcasting is a closely-knit industry and broadcast professionals fear retaliation or "blackballing"; broadcasters use their financial resources to delay resolution of the case and "wear down" the resource-poor complainant; and broadcasters will enter into a monetary settlement with a complainant rather than risk their licenses. *Id.* at 326-27.

consent to a motion to vacate the judgment.[145] Notwithstanding MMTC's claims, we are concerned that repeal of our general policy of deferring individual discrimination complaints could result in duplication of efforts and inconsistent decisions. Furthermore, we believe that where there is a conclusion that a broadcaster has engaged in employment discrimination, the Commission may take cognizance of findings of fact, notwithstanding any post-judgment settlement, particularly one intended to circumvent Commission consideration of allegations of discrimination.

69. Nevertheless, we retain the discretion to consider allegations of discrimination prior to a final determination by the EEOC or a court where the facts so warrant. However, we do not intend to routinely exercise our discretion to consider allegations of discrimination before an EEOC or court decision. We disagree with commenters who suggest that the FCC's EEO rules and policies substantially duplicate the work of the EEOC.[146] While the EEOC and the FCC share as a common goal the elimination of discriminatory employment policies and practices at broadcast stations and cable systems,[147] the primary functions of the two agencies are different. Whereas the EEOC reviews discrimination complaints for the purpose of providing relief to victims of discrimination, either individually or as a group, and deterring future discrimination, the FCC's principal concern in reviewing discrimination allegations is the fitness of broadcasters and cable entities to fulfill their obligations under the Communications Act.

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[145] *Id.* at 327.

[146] *See e.g.*, Congressmen Michael Oxley and Ralph Hall (Oxley/Hall) Comments at 3; Texas Association of Broadcasters (TAB) Comments at 3-5.

[147] MOU, 151 Fed. Reg. at 21799.

70. We will not require that broadcasters and cable entities contemporaneously notify the Commission of discrimination complaints filed with the EEOC. One commenter urges that broadcasters be required to report any discrimination complaints at least on an annual basis because broadcast license renewals now arise only every eight years.[148] However, in view of our decision to continue our policy of generally deferring action on individual discrimination complaints pending final action by the EEOC or a court, we see no reason to require that broadcasters contemporaneously notify the Commission of the filing of discrimination complaints. We note, moreover, that broadcasters are required under Section 1.65(c) of the Commission's Rules to report any adverse findings or adverse final actions involving discrimination complaints on an annual basis. [149] Thus, the Commission will not have to wait until a broadcaster files for renewal of its license to learn of an adverse finding or adverse final action on a discrimination complaint.

71. We requested comment in the NPRM on a proposal set forth by MMTC and 21 other organizations ("Joint Commenters") in *Streamlining* that the Commission consider all evidence which might be probative of discrimination or other EEO violations.[150] The Joint Commenters suggested that this type of evidence could include, among other things: evidence of a broadcaster's misconduct at commonly owned

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[148] MMTC Comments at 251.

[149] Section 1.65(c) of the Rules provides that "all broadcast permittees and licensees must report annually to the Commission any adverse finding or adverse final action taken by any court or administrative body that involves conduct bearing on the permittee's or licensee's character qualifications and that would be reportable in connection with an application for renewal as reflected in the renewal form." 47 C.F.R. § 1.65(c).

[150] *NPRM*, 13 FCC Rcd at 23026 (para. 60).

stations and headquarters units; evidence from individual allegations of discrimination in exceptional cases; evidence from nonresponsive answers or omissions on Form 396, in pleadings or in responses to Commission inquiries; evidence of failure to maintain records of EEO efforts; and evidence derived from logical inferences of potential discrimination drawn from a broadcaster's irrational explanations to the Commission for EEO nonperformance, such as claims that minorities prefer not to work in a particular format or that minorities and women prefer occupations outside of broadcasting. We invited comment on whether we should consider any of these types of evidence to be probative of discrimination. In its comments, MMTC sets forth a comprehensive proposal for a "zero tolerance policy" for discrimination and urges that the Commission consider these types of evidence to be probative of discrimination as one aspect of this zero tolerance policy.[151] Two other commenters agree that these types of evidence should be considered to be probative of discrimination.[152]

72. We agree with MMTC that discrimination by broadcasters and cable entities is manifestly contrary to the public interest and cannot be tolerated. We have thus incorporated several aspects of MMTC's proposed zero tolerance policy into the rules and policies we are adopting in this proceeding. Regarding MMTC's proposal as to the types of evidence that should be considered to be probative of discrimination, we think it appropriate, given the unique circumstances in each instance, to determine on a case-by-case basis whether these or other similar types of evidence are indicative of discrimination or other EEO violations and whether they warrant action by the Commission prior to a final

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[151] *See* MMTC Comments at 275-305.

[152] NOW Comments at 43; Gerri L. Gagnon Reply Comments at 2 (Associate Producer for Vermont Public Television).

determination by the EEOC or a court. For example, under certain circumstances, if there are well-supported allegations of discrimination made by a large number of individuals against one broadcast station or cable unit, or allegations of discrimination that shock the conscience or are particularly egregious, we may consider these allegations prior to a final determination by the EEOC or a court. In addition, if a broadcaster or cable entity engages in a pattern of deliberate and systematic violations of the EEO program requirements and such practices have the effect of denying women and minorities access to job opportunities, we may consider this to be evidence of discrimination.

73. MMTC also proposes as part of its zero tolerance policy for discrimination that the Commission expressly prohibit broadcasters from using compulsory binding arbitration agreements[153] and establish clear and fair conditions governing broadcasters' use of voluntary binding arbitration agreements.[154] Additionally, MMTC proposes that the Commission take steps to bar the practice of selling a broadcast station using procedures that exclude minority buyers.[155] MMTC further suggests that, if a broadcaster uses an expressly racist or sexist appeal in seeking the business of advertisers, the Commission

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[153] MMTC Comments at 251. MMTC defines compulsory binding arbitration agreements as agreements compelling an employee to agree that any discrimination complaints will be subject to binding arbitration. *Id.*

[154] *Id.* at 252

[155] *Id.* at 310. Specifically, MMTC proposes that the Commission require broadcasters to certify on Forms 314 (Application for Consent to Assignment of Broadcast Station Construction Permit or License) and 315 (Application for Consent To Transfer Control of Corporation Holding Broadcast Construction Permit or License) that they did not trade with a broker which engaged in these practices and deny applications filed by broadcasters which fail to make this certification truthfully. *Id.*

should investigate to determine whether the broadcaster has created a hostile working environment for minorities or women.[156] While these racist practices are repugnant and may be, in certain circumstances, inconsistent with our Character Policy Statement,[157] we will not separately address these matters in this rule making because they are beyond the scope of this proceeding, which was initiated to revise the EEO rules in light of the court's decision in *Lutheran Church*.

74. One commenter complains that the Commission's broadcast EEO Rule should be expanded to prohibit discrimination based on disability.[158] Both Congress and this Commission have sought to ensure that persons with disabilities share in the benefits that modern communications services and products have to offer.[159] We note that employment discrimination based on disability is prohibited by the

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[156] *Id.* at 307.

[157] *See In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 6 FCC Rcd 3448, 3449 (1991).

[158] Doreen Vincent Comments at 1 (video producer).

[159] *See e.g.*, Sections 225 (telecommunications services for hearing-impaired and speech-impaired individuals), 255 (access to telecommunications equipment and services by persons with disabilities), 303(u) (television receivers generally required to be equipped with a closed captioning chip), 710 (telephone service for the disabled) and 713 (video program accessibility) of the Communications Act; Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d(a)(1)(A) (accommodation by federal departments and agencies with respect to the accessibility of information, technology and data by employees and members of the public with disabilities); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, FCC 99-181, released September 29, 1999; and *Implementation of Video Description of Video Programming*, FCC 99-353, released November 18, 1999.

Americans with Disabilities Act of 1990.[160] Further, the rule changes we adopt today should assist all potential applicants, including those who are disabled, in obtaining information concerning openings at broadcast stations and cable entities. We believe, however, that the specific proposal raised in this context is beyond the scope of this proceeding.

75. Finally, we find substantial merit in several other aspects of MMTC's proposed zero tolerance policy. We address these aspects of MMTC's proposed zero tolerance policy below in our discussion of the EEO program requirements and enforcement scheme.

2. Broadcast EEO Program Requirements

a. Rules and Policies

i. EEO Program and Related Provisions

76. Recruitment. In the NPRM, we stated our belief that effective recruitment is important because women and minorities have historically experienced difficulties in finding out about, or taking advantage of, employment opportunities in the communications industry. We nonetheless recognized that the issue as to the specific recruitment techniques to be utilized was a matter that would benefit from public input. Accordingly, we requested comment on whether we should adopt a rule imposing detailed requirements or whether we should afford flexibility in recruitment techniques.[161]

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[160] Pub. L. No. 101-336, 104 Stat. 327 (1990) ("ADA"). The ADA provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

[161] *See NPRM*, 13 FCC Rcd at 23027-28 (paras. 63-65).

77. Based on our review of the Comments as discussed below, we are convinced that a meaningful program of recruitment involving broad outreach is essential to ensure equal employment. We also conclude that it is desirable to accord broadcasters flexibility in designing outreach programs that are tailored to the needs of their station and community. Moreover, we believe that the objective of ensuring that minority and female applicants have the opportunity to apply for positions in the broadcast industry may be achieved without a specific requirement that broadcasters in every situation use recruitment methods that specifically target those groups. Outreach that is truly broad and inclusive will necessarily reach minorities and females, as well as other segments of the community that in the past may have been deprived of the opportunity to compete for broadcast employment. Therefore, we will give broadcasters discretion to determine what combination of recruitment sources will yield broad and inclusive outreach. While targeted sources can enhance the effectiveness of recruitment efforts, stations will be allowed to determine whether, when and how to use them to meet their individual circumstances. However, we will reassess these conclusions and the effectiveness of this approach as we gain experience in applying our new EEO rule.

78. In order to achieve our goal of ensuring broad outreach while affording broadcasters flexibility in designing their EEO programs, we will require broadcasters[162] to comply with our new EEO program requirements, summarized as follows:

Basic Obligation: widely disseminate information concerning each full-time job vacancy (see para. 85); and comply with one of the following two outreach options:

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[162] Except where noted below, cable entities must comply with the same EEO program requirements as set forth in this paragraph.

OPTION A

Supplemental Recruitment Measures:

(i) notice of openings to qualifying organizations that request such notice (see paras. 95, 96, 97); and

(ii) two (for employment units with five to ten full-time employees) or four (for larger employment units)[163] longer-term recruitment initiatives within a two-year period including, e.g.: participation in at least 4 job fairs by station personnel who have substantial responsibility in making hiring decisions; hosting at least one job fair; co-sponsoring job fairs with women's and minority groups in the business and professional community; participation in scholarship programs directed to students desiring to pursue a career in broadcasting; sponsorship of at least two events in the community designed to inform the public as to employment opportunities in broadcasting (see paras. 99, 100, 101, 102, 103)

Recordkeeping

(i) collection, but not routine submission to the Commission of: (i) listings of all full-time jobs filled, Identified by job title; (ii) the recruitment sources used to fill each vacancy, including any organizations which requested notification; (iii) the address, contact person and telephone number of each recruitment source used to fill each position; (iv) dated copies of all advertisements, letters, e-mails, faxes, etc. used to fill each vacancy; (v) documentation necessary to demonstrate performance of supplemental outreach initiatives, e.g., job fairs,

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[163] Cable employment units with six to ten full-time employees must undertake one recruitment initiative each year and larger employment units must undertake two recruitment initiatives per year.

mentoring programs; (vi) the total number of interviewees for each vacancy and the referral source for each interviewee; (vii) the date each job was filled and the recruitment source that referred the hiree (see paras. 115, 116, 117, 118)

(ii) placement in the station public file annually a report including the following: (i) all full-time jobs filled during the previous year; (ii) recruitment sources used to fill those vacancies; (iii) address, contact person and telephone number of each recruitment source; (iv) recruitment source for each hiree; (v) recruitment source for each interviewee; and (vi) description of any supplemental initiatives implemented during the previous year (see para. 123)

or

OPTION B

Alternative Recruitment Program:

(i) design its own broad and inclusive outreach program; and

(ii) demonstrate that it is widely disseminating information concerning job vacancies by analyzing the recruitment sources, race, ethnicity and gender of the applicants attracted by its recruitment efforts (see para. 104)

Recordkeeping

(i) collect, but not routinely submit to the Commission: (i) listings of all full-time jobs filled, Identified by job title; (ii) the recruitment sources used to fill each vacancy; (iii) the address, contact person and telephone number of each recruitment source used to fill each position; (iv) dated copies of all advertisements, letters,

e-mails, faxes, etc. used to fill each vacancy; (v) data reflecting the recruitment source, gender, and racial/ethnic origin of applicants for each full-time job filled (see paras. 116, 119)

(ii) place in the station's public file annually a report containing the following: (i) all full-time jobs filled during the previous year; (ii) recruitment sources used to fill those vacancies; (iii) address, contact person and telephone number of each recruitment source; and (iv) recruitment source, race, gender and national origin for each applicant (see para. 123)

79. There is substantial support among the commenters that broad recruitment outreach is preferable to word-of-mouth recruitment, even though there is disagreement about the specific proposals set forth in the *NPRM*. MMTC contends that outreach in recruitment is the core of any meaningful EEO program.[164] Although NAB contends that the proposed rules are unduly burdensome, it advances an alternate proposal designed to provide employment information to a broad range of applicants.[165] Similarly, 46 Named StBAs expresses reservations concerning many aspects of the EEO program proposed in the NPRM, but supports the goal of broad outreach and the desirability of avoiding exclusive reliance on word-of-mouth recruitment. It proposes an alternative based on a model outreach program developed by the Broadcast Executive Directors Association ("BEDA").[166] Even commenters who oppose the adoption of any rule nonetheless urge that the Commission remain available to assist broadcasters in their

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[164] MMTC Comments at 220.

[165] NAB Comments at 5.

[166] 46 Named StBAs Comments at 3-5.

efforts to broaden their recruitment outreach.[167] In sum, the record before us confirms our view that broad outreach efforts to ensure that all segments of the population, including minorities and women, are aware of broadcast employment opportunities are of crucial importance to the goals established by Congress of deterring unlawful discrimination and fostering diversity of programming.

80. In response to our request for comments as to how to implement a meaningful outreach program, many commenters support a flexible approach rather than one mandating the use of a specified number of recruitment sources of specified types. Several commenters submit comprehensive program proposals that they believe will ensure meaningful outreach while leaving maximum flexibility to broadcasters in designing their individual programs. The following is a review of several of these proposals.

81. NAB proposes three options for complying with Commission EEO requirements. First, NAB suggests that compliance with Office of Federal Contract Compliance Programs ("OFCCP") requirements should suffice as compliance with the Commission's Rule (although NAB states that there may be constitutional problems with the OFCCP requirements). As a second alternative, NAB proposes that broadcasters could achieve compliance by participating in a Broadcast Career Program operated by their State Broadcast Association ("StBA"). This refers to the model plan developed by BEDA, which is discussed below in connection with the proposal of 46 Named StBAs. In both cases, NAB proposes that we require only that broadcasters certify every two years that they have complied with the OFCCP or BEDA programs. The third alternative proposed by NAB is a flexible outreach program developed by the licensee. The proposal would allow

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[167] HBP Comments at 28-29; S&B Comments at 23-25.

broadcasters to choose from a "menu" of six general (i.e., not related to a specific job vacancy) and nine specific outreach efforts. The general outreach efforts would include sponsorship of, or participation in, job fairs, scholarship, mentoring and intern programs, and training programs for existing employees. The specific outreach efforts would include standard recruitment methods (such as placing newspaper or magazine advertisements, making on-air job announcements, etc.) and such methods as posting job notices on internet web pages. Under NAB's proposal, a licensee would achieve compliance by utilizing two general outreach initiatives, or one general and two specific outreach initiatives, or four specific outreach initiatives.[168]

82. The proposal of 46 Named StBAs is premised on a model program developed by BEDA. The program itself consists of suggestions or "highways" that StBAs might use in maximizing EEO outreach, including outreach activities by the StBA itself and activities of the StBA to assist individual broadcasters in maximizing their outreach. Thus, the program suggests that a StBA could develop relationships with educational institutions in its state in order to encourage and assist students who may wish to pursue careers in broadcasting; sponsor internships, mentoring programs, fellowships, apprenticeships, and training programs, and assist broadcasters who wish to implement similar initiatives; provide information and assistance concerning recruitment resources and methods; take steps to encourage broadcaster participation in the StBA program and increase public awareness of the program; and conduct surveys to evaluate the effectiveness of the program. The key element of the program, according to 46 Named StBAs, is the maintenance by BEDA and StBAs of web sites for the posting of job vacancy information. Commenters have

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[168] NAB Comments at Appendix C.

pointed out that many StBAs, as well as NAB, maintain similar employment web pages. Internet usage has increased and internet access is available from 73.3% of public libraries, 46 Named StBAs asserts. Accordingly, it urges that broadcasters should be deemed to be in compliance with our rules if they post at least 67% of their vacancies on the BEDA web site or a web site maintained by a StBA. Recruitment should not be required for all vacancies, 46 Named StBAs contends, because there are some instances where there is good reason not to post a particular vacancy.[169]

83. AWRT suggests a recruitment program based on a "menu" approach. AWRT suggests a menu of 12 recruitment methods, including listing individual vacancies in various recruitment sources, and such additional techniques as job fairs, training and networking programs, and participation in media trade groups oriented to minorities and females.[170] AWRT

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[169] 46 Named StBAs Comments at 26.

[170] Specifically, AWRT's proposed menu would afford broadcasters the following choices: (i) participation in local, regional, and national job fairs; (ii) co-sponsoring job fairs with women's and minority organizations; (iii) posting each top-four job category opening with a StBA; (iv) listing each top-four job category opening with media trade groups with a broad membership of women and minorities; (v) listing all job openings in a local newspaper of general circulation and in locally distributed publications of women's and minority organizations; (vi) online listing of all openings on the station's web site and linking that site to the home pages of women's and minority organizations; (vii) participation in internship programs with local high schools, colleges, and universities; (viii) contacting college and university placement centers and/or placing advertisements in the newspapers of such institutions; (ix) participation as a sponsor or member in conventions or local events of women's and minority organizations; (x) internal training and promotion opportunities available to all employees; (xi) listing all job openings on a 24-hour job line (i.e., voice mail) maintained by the station and publicized on the air; and (xii) encouragement and use of networking by existing station personnel to reach women and minority

proposes that broadcasters with more than 10 employees be required to utilize eight of the 12 methods, while broadcasters with fewer than 10 employees only be required to utilize five of the recruitment methods.[171]

84. MMTC contends that recruitment should include the use of sources targeted to minority and female job applicants. Accordingly, it does not oppose the option noted in the *NPRM* of requiring that recruitment include at least three such targeted sources. Nonetheless, it suggests that a better approach would be to require that broadcasters fax or e-mail notifications to virtually all local and several non-local sources of job applicants. MMTC argues that this would eliminate concern as to whether sufficient minority or female organizations had been contacted. It nonetheless recognizes that a problem could arise if claims were made that a broadcaster had- failed to contact particular local organizations. It accordingly proposes that the Rule should specify a minimum number of organizations a broadcaster would be required to contact, ranging from 10 to 50, based on the size of the market.[172] MMTC also urges that non-traditional means of recruitment should be required as a supplement to recruitment conducted when a vacancy occurs. Thus, MMTC states that, contrary to its expectations, its research has led it to conclude that job fairs can be an effective means of recruitment, at least for entry-level positions. It also cites recruitment through job banks, the internet, and participation in trade events sponsored by minority and female groups as having "promise." It nonetheless argues that such activities must be conducted in a meaningful way, and that no

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applicants.

[171] AWRT Comments at 4-5.

[172] MMTC Comments at 221-23.

credit should be given for activities that are insubstantial or constitute a sham.[173]

85. As noted, we believe that recruitment for all full-time hires is essential to meaningful outreach. Thus, recruitment for only some openings could leave the most desirable positions open to a limited number of potential applicants, possibly excluding significant segments of the community, such as females and minorities. Therefore, we will require that broadcasters widely disseminate information concerning all full-time openings except in rare circumstances, as described below. To fulfill this obligation, we will require that broadcasters develop and utilize for each vacancy a list of recruitment sources (which may be freely modified as circumstances warrant) sufficient to ensure wide dissemination of information about the opening. We will not dictate the number or type of sources that a broadcaster must include in its own recruitment list. However, if the sources used cannot reasonably be expected, collectively, to reach the entire community, then the broadcaster may be found in noncompliance with our EEO Rule. A broadcaster may widely disseminate job postings through any combination of methods sufficient to ensure that its recruitment efforts are inclusive.

86. We have carefully considered BEDA's proposal that an entity should be able to satisfy its outreach obligation fully by posting job vacancies on the BEDA or state association website. Internet-based job banks such as the BEDA model hold great promise for dramatically increasing the ability of prospective applicants to gain access to information about job vacancies, not just in their community but across the state and even the country. We commend BEDA for developing this new mechanism and encourage broadcasters to use these or similar websites to help them in their recruitment efforts. It is

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[173] MMTC Comments at 230-33.

premature, however, to conclude that web posting is sufficient to ensure wide dissemination to all segments of the community. First, the BEDA job bank web site and those of state broadcast associations are still developing. As far as we can determine, most state broadcast associations do not yet in fact have internet job banks, and those that do post only a limited number of vacancies from local broadcast stations. Second, in view of their newness these websites are not well known as a repository of job advertisements for prospective applicants. Most significantly, however, access to computers is not universal and this digital divide affects minorities and those living in rural areas to a greater extent than other segments of the population.[174] We have established the E-Rate program to provide greater access to the internet in our schools and libraries. But we are not convinced that access via the public library is a widespread mechanism for prospective applicants to conduct a job search. Accordingly, we cannot now recognize such internet job banks as presumptively sufficient to achieve

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[174] *See, e.g.*, MMTC Comments at 29, citing National Telecommunications and Information Administration, "Falling Through the Net: A Survey of the 'Have Nots' in Rural and Urban America" (July 1995) and F. McKissack, "Cyberghetto: Blacks are Falling Through the Net", *The Progressive*, June, 1998; UCC Reply Comments at 19-20; and NOW Reply Comments at 43-44, citing National Telecommunications and Information Administration, "Falling Through the Net II: New Data on the Digital Divide" (July 1998) (http://www.ntia.doc.gov/ntiahome/net2/index.html) and the Benton Foundation, "Losing Ground Bit by Bit: Low-Income Communities in the Information Age" (June 1998) (http//www.benton.org/Library/Low-Income), among other sources. *See also* National Telecommunications and Information Administration, "Falling Through the Net: Defining the Digital Divide) (July 1999). This report found, based on 1998 data, a persistent and in some instances widening gap between the information rich and the information poor, including those who are younger, those with lower incomes and educational levels, certain minorities, and those in rural areas or central cities.

broad outreach. We think it preferable to consider the internet as one of several recruiting mechanisms.

87. We will continue to monitor the development of the state association internet job banks. however., and we encourage broadcasters to keep us informed as to the progress of these activities and the success of the internet as a recruiting tool. After some experience with the new rule and internet-based initiatives such as the BEDA model we would be prepared to review, upon appropriate petition, our position on this matter. We would expect such a petition to demonstrate that the internet job bank (1) is well established and provides comprehensive statewide job listings; (2) is sufficiently publicized throughout the community; (3) is available to stations that are not members of the association sponsoring the internet job bank to list their job vacancies; and (4) that computer access has become sufficiently universal so that it could be reliably assumed that an internet job posting will be readily available to all segments of the community. Finally, we would review the extent to which applicants are applying for jobs as a result of web postings, whether and why any segment of the community is having particular difficulty in gaining access to such postings, and methods by which the petitioner would reach that segment of the population.

88. As we proposed in *Streamlining*, broadcasters may engage in joint recruitment efforts, but each broadcaster will remain individually responsible for achieving broad outreach. We have concluded, based on the comments and our experience enforcing EEO rules over the last 30 years, that there is considerable value in allowing individual broadcasters flexibility to design outreach programs that will work in their communities, and that there is no effective "one size fits all" recruitment model. Moreover, such flexibility will afford relief to broadcasters in smaller markets, which may not need to use

as many recruitment sources to achieve broad outreach in their markets.

89. We recognize that there may be occasional exigent circumstances where recruitment may not be feasible. For instance, there may be a legitimate need to replace immediately an employee who departs without notice and whose duties cannot be fulfilled, even briefly, by other station employees. We nonetheless do not believe that broadcasters should be excused from recruitment for any specified percent of vacancies, as some commenters advocate. Rather, hiring without recruitment should occur only in exceptional circumstances. We cannot anticipate every circumstance which might justify filling a position without recruitment. We will rely upon the good faith discretion of broadcasters. However, we expect nonrecruited vacancies to be rare relative to the number of vacancies for which recruitment is conducted, because our Rule generally requires recruitment for every vacancy.

90. We expect broadcasters to allow a reasonable time after recruitment is initiated for applications to be filed before the position is filled. We recognize that occasionally a shorter time might be necessary because of extraordinary circumstances. However, we caution that excessive instances of hires being made shortly after the initiation of recruitment could result in a finding of noncompliance if the evidence suggests that the broadcaster is not in good faith allowing adequate time for applicants to respond to its outreach efforts or is not considering their applications.

91. We do not accept NAB's proposal that broadcasters should be deemed in compliance with our EEO Rule based only on their certification of participation in a StBA program set up pursuant to the BEDA program. The BEDA program itself consists of suggestions that individual StBAs are not required to follow. Thus, the actual components of particular StBA programs will vary. The existence of different requirements in

different states would be confusing to the public and difficult to enforce. Also, the BEDA program is premised on the use of the internet as the primary recruitment source, which we find inadequate at this point. Nonetheless, the efforts of the StBAs are to be commended. Moreover, there remains an ample role for programs developed by the StBAs in assisting broadcasters in meeting the EEO requirements we are adopting herein, in coordinating joint recruitment efforts, and in promoting the further development of the internet as a recruitment tool.

92. We have also considered MMTC's suggestion that broadcasters be required to use all available recruitment sources. This is an approach that may recommend itself to many broadcasters, especially insofar as such technologies as e-mail and fax make the notification of a large number of sources less burdensome. However, as MMTC concedes, there are difficulties in adopting this approach as a requirement, primarily in terms of identifying the universe of available sources. Also, it could result in sending notifications to many sources that are neither interested nor productive. The solution of placing a maximum on the number of sources broadcasters would be required to use does not entirely cure the problems because there could still be disputes in situations where a broadcasters asserts that the number of available sources is less than the maximum.

93. We will apply the recruitment requirement to all full-time employees, including lower-level employees. As indicated in the *NPRM*,[175] we believe that lower-level positions provide an important means of entry into the broadcast industry that can lead to higher-level positions and even ownership. Nothing in the record has convinced us otherwise. Indeed, we have received comments from a number of persons who currently hold high-level positions in broadcasting, whose personal

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[175] *NPRM*, 13 FCC Rcd at 23021-22 (para. 44).

experience confirms this to be the case.[176] Also, as discussed above, the application of outreach requirements to all levels is necessary to deter discrimination and we believe that Congress intended the Commission to apply EEO requirements to all job categories.

94. In addition, as discussed above, we are adopting two options from which broadcasters may choose to ensure the success of their outreach. As indicated above, under the first option, broadcasters would be required to undertake two kinds of supplemental recruitment measures. We emphasize, however, that, while we believe that these measures will aid in achieving broad outreach, they are only intended to be supplemental to a broadcaster's own broad and inclusive recruitment program efforts to widely disseminate job vacancy information, which, as was requested by many commenters, we are permitting broadcasters to design pursuant to their employment units' individual circumstances. Regardless of the option chosen, broadcasters have an affirmative obligation to recruit for vacancies that cannot be delegated to any outside group.

95. We have previously stated the reasons why we will not implement MMTC's proposals that broadcasters be required to fax or e-mail notifications to virtually all local and several non-local sources of job applicants or, in the alternative, contact a minimum number of organizations to ensure that a sufficient number of minority and female sources are notified of job vacancies. However, we will require broadcasters to provide notification of job vacancies to any organization that requests such notification, provided the organization is a kind that

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[176] MMTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 3 (Declaration of W. Don Cornwell), 8 (Declaration of Serena Ferguson Mann), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey), and 20 (Declaration of Jeffrey H. Smulyan).

regularly distributes information about employment opportunities to job seekers or refers job seekers to employers. We believe that this requirement addresses MMTC's concern because it is designed to ensure that any sector of the community that believes that it has been inadequately served by the station's outreach program has a means of obtaining notices of openings. This notification requirement will provide a "safety valve" in the event that a community organization with ties to a particular sector of the community believes that such sector is not being adequately reached by the broadcaster's chosen recruitment procedures. In this way, the organization could be instrumental in spreading the word about openings to its constituents. For example, a recruitment organization with ties to a particular racial or ethnic group or to college students or to persons with a particular disability, could request notices of openings for the purpose of notifying its constituents of vacancies as they arise. The obligation to notify such organizations provides added assurance that a broadcaster's recruitment notices will reach all segments of the community. For example, a college campus placement office might be able to inform college students about openings more effectively that the broadcaster is doing through its selected channels. Similarly, an organization with ties to a particular ethnic group might be well situated to disseminate information about vacancies in a group's first language. An organization that serves disabled persons, such as blind people, could keep them informed of openings of which they might be unaware if those openings were advertised only in publications that are inaccessible to vision-impaired persons. We also expect broadcasters to make reasonable efforts to publicize the notification requirements in their communities so that qualifying groups are able to learn of the new procedure. Such efforts could take the form of, for example, announcements on their stations or newspaper advertisements. Joint

announcements by broadcasters would also be a reasonable way to meet this requirement.

96. We believe that organizations that come forward to request vacancy notifications may prove to be very productive referral sources. These organizations have a well-defined interest and may be able to help broadcasters achieve the kind of robust and inclusive outreach that will promote equal employment opportunity. Further, this approach will enable interested groups to more closely monitor and, if necessary, seek to improve, broadcasters' recruitment efforts.

97. We will provide broadcasters ample discretion to determine the method of providing notice to requesting parties. Such methods may include electronic mail and facsimile and we encourage the use of such methods as they may require fewer personnel and financial resources to fulfill the notification requirement than more traditional methods. For example, a broadcaster may maintain an electronic list of recruitment sources and notify all the sources simultaneously with a single e-mail when a vacancy occurs. We will also allow notifications to be made as part of joint recruitment efforts among broadcasters. However, each broadcaster participating in the joint recruitment efforts remains individually responsible for ensuring that notifications relating to its employment unit are made. For example, a state broadcast association may have a job bank that notifies certain sources on behalf of an employment unit when a vacancy becomes available at that employment unit. As long as the state broadcast association notifies all organizations requesting vacancy announcements from that employment unit as part of this process, the employment unit itself does not have to do so. Therefore, given the flexibility provided by electronic forms of notice and joint recruitment, we believe that the notification requirement will place minimal burdens on broadcasters. However, if experience

proves otherwise, especially with respect to burdens on small broadcasters, we can revisit this requirement.

98. We want to emphasize that the obligation to notify recruitment sources that request notice of vacancies is intended as a supplement to, not a substitute for, broadcasters' core, nondelegable obligation to widely disseminate information concerning all job vacancies. While recruitment sources will have the right to ask broadcasters for notices of vacancies, they have no obligation to do so. And even if a broadcaster does not receive a single request for notice of vacancy information, it will nevertheless be responsible for ensuring that notice of vacancies is widely disseminated. If it fails to do so, we will not regard as a legitimate excuse the fact that no recruitment organization requested notice.

99. As the second supplemental recruitment measure, we will require that broadcasters engage in outreach efforts beyond the traditional recruitment that occurs in response to individual vacancies. These include such supplemental recruitment measures as job fairs, intern programs, training programs, mentoring programs, and interaction with educational and community groups. Standard recruitment for specific vacancies is useful to ensure outreach to persons who already have broadcast experience. However, it is also desirable to encourage outreach to persons who may not yet be aware of the opportunities available in broadcasting or have not yet acquired the experience to compete for current vacancies. Such persons are likely to include minorities, females, and others who have in the past been excluded by word-of-mouth recruitment methods. Moreover, we recognized in 1994, as part of our overall review of the EEO requirements then in place, that lack of training may be a factor impeding the diversification of a broadcaster's workforce and that such methods as intern and

training programs may be useful in addressing that problem.[177] Several commenters have endorsed supplemental recruitment measures as valuable tools for achieving outreach. For instance, MMTC indicates that its research showed that job fairs are an effective method of recruitment, at least for entry level positions. Accordingly, we conclude, based on our review of comments emphasizing the usefulness of such measures, that it is important to promote such nontraditional outreach methods, which have in the past been a secondary aspect of our EEO Rule.

100. We will accord broadcasters discretion as to how they implement this aspect of our Rule. We are impressed by the "menu" approach suggested by several commenters. We agree that the effectiveness of particular supplemental recruitment measures will necessarily vary based on the circumstances at each station. To establish inflexible requirements regarding such measures could impose inappropriate requirements in some cases. We will accordingly incorporate in our EEO Rule a menu of options for supplemental recruitment initiatives, which will enable broadcasters to select the approaches that they believe will be most effective in their situations.

101. The first three menu options include participation in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions; hosting at least one job fair; or co-sponsoring at least one job fair with an organization in the business and professional community whose membership includes substantial participation of women and minorities. We believe that job fairs are a useful method to reach a broad range of individuals who are interested in employment in the industry. The fourth option is participation in at least four activities sponsored by community groups active in broadcast employment issues, including conventions, career

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[177] *See Report*, 9 FCC Rcd at 6319.

days, workshops and similar activities. Such participation will enable broadcasters to establish relationships with groups in the community that might otherwise be overlooked. The fifth option is the establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment. Such an endeavor would serve the goal of broad outreach by increasing the number of qualified potential employees not only for one broadcaster, but for all broadcasters in the area. The sixth option is participation in general (as opposed to vacancy-specific) outreach efforts by such means as job banks or internet programs such as those described in the model program developed by BEDA. While such sources may be used as recruitment sources when specific vacancies occur, they can also be useful even when there is no specific vacancy to elicit interest from persons who may later be considered for a specific position. The seventh option is participation in scholarship programs directed to students desiring to pursue a career in broadcasting. The benefit of this outreach is that it attracts students, including minorities and females, toward careers in broadcasting, ultimately increasing the number of qualified potential employees. The eighth and ninth options are, respectively, the establishment of training and mentoring programs designed to enable station personnel to acquire skills that could qualify them for higher level positions. These options would not be satisfied by ordinary training required for employees to perform their current positions. These options are rather intended to increase employee skills so they can qualify for higher positions.

102. The tenth option is participation in at least four events or programs relating to career opportunities in broadcasting sponsored by educational institutions. Such participation again serves the purpose of increasing the universe of potential employees from which broadcasters attract job applicants. For instance, the BEDA program contends that it is important that educational institutions perceive broadcasting as a rewarding

career for their students and offer courses and experiences that will be helpful to students who may choose a career in broadcasting.[178] The eleventh option includes sponsorship of at least two events in the community designed to inform the public as to employment opportunities in broadcasting. We believe that such activities can serve to increase public awareness of the opportunities available in broadcasting. The twelfth option is the only one related to regular recruitment efforts. It would entail listing each upper-level opening in a job bank or newsletter of a media trade group whose membership includes substantial participation of women and minorities. Finally, the thirteenth option includes participation in activities other than the twelve listed options that the licensee has designed to further the goal of disseminating information about employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities. This will provide flexibility for worthwhile initiatives that broadcasters may develop but that are not strictly within the scope of the menu options we have specified. While we are not requiring that broadcasters use particular recruitment sources, we encourage broadcasters to use an array of sources that furthers the goal of broad outreach.

103. For broadcasters who elect to utilize the supplemental recruitment measures, we will expect station employment units with more than ten full-time employees to implement four of these options every two years. For example, a broadcaster could fulfill this requirement by, during a two-year period, hosting one job fair, establishing an internship program, participating in a scholarship program, and co-sponsoring one job fair with an organization in the business and professional community whose membership includes substantial participation of minorities and women. For reasons discussed below, station employment units

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[178] 46 Named StBAs Comments at Exhibit 1, p. 2.

with five to 10 full-time employees should implement two of the options every two years. The pertinent two-year period will be that preceding the filing of Statements of Compliance (Form 397) or Broadcast EEO Program Reports (Form 396), discussed below.[179] We will not specify in detail what steps should be taken to implement each option because we wish to accord broadcasters maximum flexibility and opportunity to experiment. While each broadcaster will be responsible for implementing the menu options it selects, joint recruitment efforts may be used in connection with some of the menu options, including participation in job banks and internet programs.

104. A number of broadcasters have urged the Commission to give them discretion to design an outreach program that is responsive to the needs of the broadcaster's organization and the local community.[180] We are willing to allow broadcasters to forego the supplemental recruitment measures described above and to design their own outreach program to suit their needs, as long as they can demonstrate that their program is inclusive, i.e., that it widely disseminates job vacancies throughout the local community. Accordingly, if a broadcaster elects to design

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[179] We recognize that some broadcasters may not have a full two years prior to the filing of the initial Statement of Compliance. Also, there will likely be situations where a broadcaster acquires a station during the two-year period. In such circumstances, a broadcaster may reasonably apportion the extent of its activities to reflect the period of time actually available to it. Absent evidence of bad faith, we will accept the broadcaster's reasonable judgment in this respect.

[180] *See, e.g.*, NAB Comments at 13; Virginia and North Carolina Associations of Broadcasters (VAB/NCAB) Comments at 10; Evening Post Comments at 20.

its own program rather than utilize the supplemental measures, we will require that it collect data tracking the recruitment sources, gender, and race/ethnicity of its applicant pools so that the broadcaster, the public and the Commission can evaluate whether the program is effective in reaching the entire community. If the data collected does not confirm that notifications are reaching the entire community, we expect a broadcaster to modify its program as warranted so that it is more inclusive. Thus, the rules we are adopting require a broadcaster to analyze the effectiveness of its outreach program, and address any problems found. The records required to be maintained by broadcasters choosing this approach are detailed in our general discussion of recordkeeping below.

105. While we are affording broadcasters the option of either employing supplemental recruitment measures to ensure broad outreach or verifying broad outreach using applicant pool data, we believe that, having selected an option, a broadcaster should use the selected option for a sufficient period of time so that it, the public, and the Commission can meaningfully assess the success of the broadcaster's efforts. As will be discussed below, as part of our enforcement process, we are requiring broadcasters to file Statements of Compliance every two years. We will permit a broadcaster to select a different option at the time it files its Statement of Compliance. Thereafter, the broadcaster should adhere to the option selected for at least the two-year period until the filing of its next Statement of Compliance.

106. Initially, we will require that broadcasters file with the Commission and place in their public file a statement as to their election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach within forty-five days of the effective date of the new rules. This will ensure that both the Commission and the public are aware of the approach the

broadcaster intends to implement. In order to facilitate the initial election, we are preparing a form to be utilized for the initial election. Any broadcaster that does not receive a copy of the form by mail may obtain one from the Commission. A broadcaster may change its initial election when its first Statement of Compliance is due, even if that is less than the ordinary two-year period. Thereafter, as noted, a broadcaster will be expected to adhere to its election until the filing of its next Statement of Compliance. However, if there is a sale of the station subject to Commission approval pursuant to FCC Form 314 or FCC Form 315, the buyer may select a different option than that employed by the seller, even though it is within the two-year period. Copies of the initial election statements will be on file in the Commission's Public Reference Room. In the future, we intend to make information regarding a broadcaster's election electronically available on our web site.

107. Under our former EEO Rule, we did not require station employment units with fewer than five full-time employees to demonstrate compliance with the EEO program requirements. We will continue that policy under the EEO Rule being adopted herein. We emphasize, however, that all broadcasters, including those that are part of employment units with fewer than five full-time employees, are subject to the provision of the EEO Rule that prohibits discrimination. In accordance with our prior practice, we will consider employees to be full-time if their regular work schedule is 30 hours per week or more.

108. The term "station employment unit" refers to a station or group of commonly owned stations in the same market that share at least one employee. We believe that linking certain EEO program requirements to employment units will enable us, as well as broadcasters, to treat station combinations that share employees as one entity. Thus, broadcasters are required to undertake four menu options every two years per station employment unit, not per station. At the same time, large

broadcasters cannot claim small station treatment by maintaining that each station in a station combination employs a small staff.

109. As proposed in the *NPRM*,[181] we will not require recruitment for internal promotions, nor will we require recruitment for temporary employees. Typically, we view temporary employees as including those hired as emergency replacements for absent regular employees or those hired to perform a particular job for a limited period of time. However, if a person is hired full-time to perform a regular station function for an extended period of time (e.g., more than six months), such a hire will be treated as a permanent hire for which recruitment would be required. We recognize that some broadcasters may wish to hire employees initially on a temporary basis with the possibility of retaining them on a permanent basis if their performance is satisfactory. In such circumstances, if recruitment is done at the time of the temporary hire, any later decision to convert the employee's status to full-time may be treated as a promotion. However, if an employee is hired as a temporary employee without recruitment, recruitment should occur if the employee is later considered for a permanent position. We caution that excessive instances of temporary hires being converted to permanent hires without a meaningful opportunity for recruited applicants to compete could result in a finding of noncompliance if the evidence suggests the practice has the effect of avoiding meaningful outside recruitment.

110. Questions were also raised as to the status of part-time employees, interns and former employees. Under our former EEO Rule, we expected broadcasters to recruit for part-time positions but did not focus on part-time hires in our review of

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[181] See *NPRM*, 13 FCC Rcd at 23028 (para. 67)

EEO programs.[182] We see no reason to depart from this policy, which serves to minimize burdens on broadcasters, especially smaller broadcasters. We will include a provision in our Rule clarifying that, in the case of part-time hires, broadcasters need only substantially comply with the requirement to recruit for every vacancy. With respect to interns, we would expect that they would ordinarily constitute temporary hires or non-employee volunteers. They would thus not be subject to our recruitment requirements.[183] However, a decision to employ them permanently would be a hire subject to recruitment. Finally, no good reason has been cited for exempting hires involving former employees from recruitment requirements. Thus, we will expect recruitment for those hires.

111. Analysis/Recordkeeping. In the *NPRM*, we proposed that broadcasters analyze the success of their recruiting efforts in attracting minorities and females to apply for vacancies. We proposed requiring broadcasters to maintain records as to the race, national origin, and gender of all applicants generated by each recruitment source for each vacancy in order to assess the effectiveness of its recruitment efforts. We requested comments as to how broadcasters should analyze the success of their recruitment efforts and whether extensive applicant pool records were necessary to that process.[184]

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[182] *See, e.g., WFSQ (FM)*, 7 FCC Rcd 6045, 6046 (1992); *Enterprise Media of Toledo, L.P.*, 12 FCC Rcd 3920, 3923-24 (1997).

[183] Curators asserts in its Comments at 4-5 that it has 40 to 60 student interns who, for insurance purposes, are carried on its payroll as part-time employees. For purposes of our EEO Rule, persons who function as student interns may be treated as such, irrespective of how they are treated for insurance purposes. Conversely, merely labeling an individual as an "intern" would not excuse a broadcaster from recruitment if the person were actually functioning as a permanent full-time employee.

[184] *NPRM*, 13 FCC Rcd at 23029-30 (paras. 72-73).

112. Many broadcasters questioned the need for analysis based on extensive applicant pool data. They contend that recordkeeping is burdensome because it relies primarily on voluntary self-identification by applicants as to their racial and ethnic status. Commenters assert that it is difficult and time-consuming to compile such data in a reliable manner and that resources could be better devoted to other EEO efforts. They also urge that many job applicants resent inquiries as to race and ethnicity because they do not understand the relevance of such information to their applications for broadcast employment.[185]

113. Our purpose in proposing the collection and evaluation of applicant pool data, including the race, ethnicity, gender, and referral source of applicants, was to ensure that broadcasters are engaging in meaningful outreach and to provide a basis upon which broadcasters can evaluate their efforts. However, we have no desire to impose data collection and recordkeeping requirements on broadcasters that may be unnecessary for purposes of accomplishing the goals of our EEO rules. We believe that our goal of ensuring that broadcasters engage in broad outreach so that all qualified job candidates are informed of employment opportunities in the industry can be accomplished through compliance with the core obligation to recruit widely for job vacancies coupled with the use of the supplemental recruitment measures, without requiring the collection or reporting to the Commission of applicant pool data. Therefore, broadcasters who elect to utilize the supplemental recruitment measures we have adopted will not be required to maintain data concerning the recruitment source, race, ethnicity, and gender of their applicants to comply with

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[185] *See, e.g.*, NJBA Comments at 2-3, 5; TAB Comments in MM Docket No. 96-16 (incorporated by reference in its Comments herein) at p. 8-10; VAB/NCAB Comments at 7-9; Fisher Reply Comments at 7-8; 46 Named StBAs Reply Comments at 14-17.

this rule. However, if a broadcaster wishes to avail itself of the option of dispensing with the supplemental recruitment measures and designing its own program, we do not think it is unreasonable to require it to collect applicant pool data demonstrating that its outreach efforts are inclusive. We note that our decision in this regard is not intended to relieve broadcasters of recordkeeping requirements imposed under other federal and state laws.

114. Regardless of the chosen approach, we expect a broadcaster to utilize the relevant data concerning its recruitment efforts as part of ongoing efforts to analyze the productivity of its recruitment efforts in achieving broad outreach to all segments of the community, including minorities and women, and to determine whether any modifications in its EEO efforts or recruitment sources are warranted. We note in this respect that such modifications can extend beyond merely adding new sources if existing sources are not productive. They can also encompass efforts to contact unproductive sources in order to develop a relationship that may encourage the sources to become more productive.

115. Data as to the recruitment sources of the broadcaster's interviewees and hirees (in the case of those broadcasters which opt to employ the supplemental recruitment measures) or applicant flow data (in the case of other broadcasters) will be one source of information concerning a broadcaster's EEO efforts that we may, as warranted, utilize in determining whether the broadcaster has demonstrated compliance with our EEO Rule. Thus, in appropriate cases, such data will be one pertinent source of information in making our overall determination as to whether the broadcaster made serious efforts to achieve broad outreach to all segments of the community, including minorities and women. Our ultimate determination will be premised on all relevant factors concerning a broadcaster's EEO efforts, not on statistical

records alone. Some of the other relevant factors include the reach of the recruitment sources utilized (such as the circulation of media in which vacancies were advertised), whether the broadcaster adequately analyzed the results of its efforts, implemented effective measures to correct any problems, and avoided excessive reliance on word-of-mouth recruitment. In assessing a broadcaster's efforts, we will not consider the extent to which minorities and women were actually hired or the racial, ethnic, or gender composition of a station employment unit's workforce.

116. Under either approach, a broadcaster should maintain a list of vacancies for full-time permanent positions in its station's employment unit filled during the pertinent review period, Identified by job title, as well as copies of any documentation necessary to show all vacancy-specific recruitment efforts undertaken. This could include such traditional verification as copies of newspaper advertisements. It could also include electronic records such as copies of e-mails or web pages. The records should be sufficient to show the name of the recruitment source, its address, telephone number, e-mail address (if applicable), contact person, and how the source received its notification (e.g., regular mail, fax, e-mail, etc.). In the case of a broadcaster utilizing the supplemental recruitment measures, the records should include proof that notification has been provided to organizations that have asked to be notified of job vacancies.

117. Next, we will require that broadcasters utilizing the supplemental recruitment measures retain documentation necessary to verify that they have engaged in the activities required under our second supplemental recruitment measure, such as participation in job fairs. Because of the diverse nature of these activities, we cannot prescribe precisely the type of records to be maintained. However, they should be sufficient not only to verify that some activity occurred, but also to fully

disclose the nature of the activity and the scope of the broadcaster's participation in it, including the station personnel involved. Our purpose in adopting this requirement is to ensure that the activities engaged in by broadcasters are consistent in furthering the intent of our Rule.

118. We shall also expect broadcasters who elect to utilize the supplemental recruitment measures to retain records of the referral source for each individual whom it interviews or hires for a full-time position. This information is designed to provide a starting point for a broadcaster to analyze the success of its recruitment efforts. Thus, if it appears that, despite a broadcaster's outreach efforts, an excessive number of hires or interviewees are coming from inside, "word-of-mouth" recruitment sources, we will expect the broadcaster to consider whether its outside recruitment efforts are achieving a sufficiently broad outreach and attracting qualified candidates. Similarly, a broadcaster should consider the sufficiency of its recruitment efforts if it discovers that certain segments of the community are not being effectively notified of job vacancies. If the broadcaster determines, based on its analysis, that its recruitment efforts are not achieving a broad outreach or not attracting qualified candidates, then we expect the broadcaster to make any modifications to its program necessary to correct the deficiency. "Inside sources" include primarily personal or business acquaintances, such as employees or other broadcasters, who are referring other personal or business acquaintances. They also include fortuitous sources, such as "walk-ins." We are requiring that interviewee referral source data be kept because we believe that data concerning the recruitment source of interviewees, as well as hires, will provide the broadcaster a preliminary basis for assessing its efforts -- in particular, the sources of its most qualified job applicants -- without creating a significant recordkeeping burden. Thus, the broadcaster can easily inquire as to the

recruitment source at the interview, if it is not previously known.

119. As noted, we will require those broadcasters which elect not to utilize the supplemental recruitment measures to maintain data concerning the recruitment source, race, ethnicity, and gender of applicants. Insofar as a broadcaster chooses to utilize applicant flow data, the following guidelines are provided in order to minimize the burdens. As part of our former EEO requirements, we required the reporting of "referrals." For purposes of this rule, the Commission does not expect the separate tracking of "referrals," as distinct from applicants, because it is potentially confusing. For example, in the past, some have viewed a "referral" as synonymous with an "applicant," whereas other have viewed a "referral" as including a person who has been referred to the station, even though the person may not be known to the referring source and may not even be seeking employment.[186]

120. We also emphasize that, in the case of those broadcasters who utilize applicant pool data, there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force. However, few or no females or minorities in a broadcaster's applicant pools may be one indication (and only one indication) that the station's outreach efforts are not reaching the entire community. The representation of females and minorities in applicant pools is only one factor that we will look at in determining whether a broadcaster's outreach program is inclusive. We may ultimately determine that outreach efforts are reasonably designed to reach the entire community, even if few females or minorities actually apply for openings. Conversely, the fact that a sizeable number of females or minorities have applied for openings will not necessarily

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[186] MMTC Comments at 247.

establish the inclusiveness of the station's efforts. Also, we recognize that an employer cannot control who applies for jobs. The only purpose of the data collection is to give the broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community.

121. We will require that all records documenting outreach efforts be retained until the grant of the renewal application covering the license term during which the hire or activity occurs. However, in order to lessen any burdens, we will adopt the proposal of several commenters that records may be maintained in an electronic format, e.g., by scanning pertinent documents into a computer format. In addition to reducing burdens, computer records can be backed up, which should lessen the chances of records being lost. We caution broadcasters that, absent a showing of extraordinary circumstances, we will not credit claimed activities that cannot be supported by records.

122. Although we are imposing some recordkeeping requirements on broadcasters, the new EEO Rule allows a broadcaster the flexibility to choose the outreach methods that best suit the characteristics of a particular employment unit, such as staff size and location, and there are different data collection requirements for each outreach method. Moreover, broadcasters may utilize electronic methods of keeping records, filing Statements of Compliance with the Commission, and disseminating information about job vacancies. Therefore, we conclude that the recordkeeping requirements we adopt in this *Report and Order* will not place undue burdens on broadcasters.

123. Public File. Given the Commission's limited resources, we believe that it is important that the community have a role in monitoring broadcaster compliance with our EEO Rule. In

order to facilitate public input, we will require that all broadcasters place in their public files annually, on the anniversary of the date they are due to file their renewal applications, the following information, which we will refer to as the EEO public file report: (1) a list of all full-time vacancies filled by the station employment unit during the preceding year, identified by job title; (2) for each such vacancy, the recruitment source(s) utilized to fill the specific vacancy (including, in the case of broadcasters utilizing the supplemental recruitment measures, organizations entitled to notification of vacancies, which should be separately identified), including the address, contact person, and telephone number of each source; and (3) a statement as to whether they have elected to utilize the supplemental recruitment measures provided for in the EEO Rule. In addition, broadcasters which elect to utilize the supplemental recruitment measures will be required to include in their public file a list of the recruitment source that referred the hiree for each full-time vacancy; data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and, for each recruitment source utilized in connection with any such vacancies, the total number of interviewees referred by that source; and a list and brief description of supplemental recruitment measures undertaken pursuant to the second supplemental recruitment measure discussed above during the preceding year.[187] Those broadcasters which do not elect to utilize the supplemental recruitment measures will be required to include in their public file, for each recruitment source utilized for any full-time vacancy during the preceding year, the total number of

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[187] We recognize that, in some years, the licensee may not have implemented any outreach initiatives because they are required to be completed over a two-year period. If a broadcaster has deferred its initiatives to the second year, it may indicate "none" in the EEO public file report for the first year, accompanied by an appropriate explanation.

applicants generated by that source, the number of those applicants who were female, and the number of those applicants who were minority, identified by the applicable racial and/or national group with which each applicant is associated.

124. We shall amend the public inspection file rules, Sections 73.3526 and 73.3527, to reflect these new requirements.[188] Broadcasters are free to utilize any format in their public file report to avoid unnecessary duplication as long as the report clearly provides the information requested. For instance, if a broadcaster utilized the same recruitment sources for all its vacancies, it may maintain a single list of those sources, indicating that they were used for all vacancies. If a broadcaster utilized different sources for different vacancies, it may maintain a master list of all its sources and utilize a cross-reference system to show which sources were used for which vacancies. The EEO public file report need not be routinely submitted to the Commission, except in two instances. The EEO public file report covering the year preceding the filing of a renewal application will be submitted with that application as an attachment to Form 396, and will be one basis for our review of the broadcaster's compliance at renewal time. Also, for stations subject to mid-term reviews, the EEO public file report for the one-year period preceding the mid-term review will be filed with the Commission and will be one basis for mid-term reviews. Renewal and mid-term review procedures are discussed in greater detail below. We also require that, if a broadcaster has a web site for its station, it post that station's EEO public file report on that site at the same time that it places it in the station's public file.

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[188] We note that 47 C.F.R. §§ 73.3526 and 73.3527 have been revised by *Main Studio and Local Public Inspection Files Report and Order*, 13 FCC Rcd 1569 (1998), *petitions for reconsideration denied in part and granted in part*, 14 FCC Rcd 11113 (1999). The reconsideration does not affect any EEO issues.

125. Relief for Qualifying Stations. The Commission requested comment on a proposal to exempt certain small stations, e.g., those with ten or fewer full-time employees, or those located in small markets, from certain EEO recordkeeping and reporting requirements.[189] The proposal to grant relief to small staff stations would increase the employment reporting and recordkeeping threshold of fewer than five full-time employees to, e.g., ten or fewer full-time employees. There was no specific proposal regarding the appropriate market threshold for exempting stations in small markets. The *NPRM* requested comment on several factors to be considered when contemplating small station relief, including a case in which the court rejected a similar increase in employment threshold, *Office of Communications of the United Church of Christ v. FCC*, 560 F.2d 529, 532 (2nd Cir. 1977) ("UCC"); the possibility that the exemptions proposed would require approval from the Small Business Administration prior to implementation; and Section 334 of the Communications Act, which prohibits revision of EEO regulations and forms pertaining to broadcast television licensees and permittees.[190] Although a few commenters discussed small market exemptions, the majority of commenters who addressed this topic focused on the proposal to increase the employment threshold for stations.

126. While we believe that small market stations should be granted some relief from EEO requirements because of difficulties those stations have competing for employees with stations in larger markets, we believe that such relief is already built into the new broadcast EEO Rule, which affords flexibility to tailor EEO programs to a station's particular circumstances,

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[189] *NPRM*, 13 FCC Rcd at 23032 (para. 84).

[190] *Id.* at 23033 (para. 86).

including market size.[191] For instance, stations in small markets may find that they need fewer recruitment sources to achieve broad outreach than might be the case in larger markets. Also, because stations in smaller markets are likely to attract fewer applicants, they may find the Alternative Recruitment Program a less burdensome method of assessing the effectiveness of their outreach. In contrast, we believe that small staff stations warrant some additional relief from the EEO Rule adopted in this *Report and Order* because, as argued by some commenters, such stations have limited personnel and financial resources to carry out those requirements.[192] In particular, we believe stations that are part of employment units with five to ten employees, the smallest staff stations subject to our EEO program requirements, would encounter these difficulties to such an extent that additional relief for these stations from EEO program requirements is warranted. However, we agree with other commenters who contend that a total exemption from the EEO Rule for stations with five to ten full-time employees would be ill-advised given these stations' important role in providing entry-level opportunities into the broadcast industry.[193] Furthermore, we believe that a total exemption for these stations is no longer necessary given, as already discussed, the more flexible EEO requirements for broadcast stations adopted in this *Report and Order*. Therefore, similar to

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[191] For similar reasons, we find it unnecessary to grant additional administrative relief from EEO requirements to foreign language television stations, as one commenter requests. Lincoln Broadcasting Company (Lincoln) Reply Comments at 5 (licensee of a California television station).

[192] *See, e.g.*, VAB/NCAB Comments at 15; S&B Comments at 21.

[193] *See, e.g.*, AFTRA Comments at 4-5 of Attachment: NOW Reply Comments at 35-36.

an approach suggested by AWRT,[194] we will require stations that are part of an employment unit with five to ten full-time employees which elect to employ the supplemental recruitment measures to select only two options from the second supplemental recruitment measure menu during each two-year period, rather than the four required of larger stations. Moreover, as discussed below, broadcasters may elect to forego the supplemental recruitment measures entirely and simply collect applicant flow data demonstrating that their recruitment efforts are inclusive. This may be less burdensome to many small broadcasters, which, in our experience, tend to have relatively few vacancies. Also, as discussed below, although we are extending mid-term review procedures required by Section 334 of the Communications Act for television stations to radio stations, we will exempt radio stations that are part of an employment unit with five to ten employees from this requirement.[195] Given their small staffs and relatively few vacancies, we do not believe it would be a productive use of scarce Commission resources to conduct mid-term reviews of small radio stations' EEO practices.

127. Qualifying stations will be expected to meet all other EEO requirements, including, e.g., filing Statements of Compliance and Forms 396 and 395-B. We emphasize that a station will not qualify for this relief if it shares one or more employees with one or more commonly owned stations in the same market and their combined staffs total more than ten full-time employees. Stations in such a situation are considered one employment unit and are required to report all of their employees on one Annual Employment Report, as described below. We will continue to follow our policy of not requiring

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[194] AWRT Comments at 4.

[195] In light of Section 334 of the Act, we do not have the authority to extend this relief to television stations with five to ten employees.

station employment units with fewer than five full-time employees to demonstrate compliance with EEO program requirements.

128. Our decision today is consistent with the *UCC* decision. That case held that when the Commission changes the criteria for application of existing regulatory requirements, it must articulate a rational explanation for the change.[196] Here, the Commission will continue applying its EEO requirements to stations that are part of an employment unit with five or more employees, the same threshold it has applied in the past. We are simply tailoring our requirements to minimize undue burdens on certain stations. In fashioning the new requirement that stations undertake certain supplemental recruitment measures selected from a "menu," we have decided to require stations with more employees to undertake more of those measures than smaller staff stations because the latter have fewer resources to carry out those requirements. In addition, we are exempting radio station employment units with five to ten employees from the new mid-term review of radio stations. The court acknowledged in UCC that "when initial cut-off or threshold criteria for determining the applicability of particular regulations are involved, the agency's reasoning need at times consist only of 'practical considerations of administration.'"[197] Since these are new requirements and reasonable practical considerations have guided our choice of criteria for applying them, our determination is consistent with *UCC*. We note that SBA has approved the approach we are adopting for small

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[196] 560 F.2d 529, 532-533.

[197] *UCC* at 532, *quoting Goldberg v. Weinberger*, 546 F.2d 477, 480 (2d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977).

broadcast stations, as well as the similar approach we are adopting for small cable entities, discussed below.[198]

129. Other Matters Concerning Broadcast EEO Rule. We proposed in the *NPRM* to require broadcasters to analyze various specific recruitment practices, including such areas as promotions and selection techniques or tests, to ensure that they are nondiscriminatory. We will incorporate these provisions into our EEO Rule, with minor modifications, with the exception of the item relating to the analysis of recruitment efforts.[199] We will address that topic in a separate rule provision. Also, two commenters assert, with specific reference to selection techniques and tests, that these provisions would impose requirements more stringent than those imposed by Title VII. We do not intend to impose any substantive requirements regarding selection techniques and tests that go beyond those imposed by Title VII. Further, we would treat any complaint that a broadcaster had in fact discriminated in the specified areas in accordance with our general policy concerning individual complaints of employment discrimination. Thus, as discussed above, we will, in general, decline to review individual complaints of discrimination pending a finding of discrimination by the EEOC or court. However, we may act prior to such a finding if we find that action is warranted in light of circumstances in a particular case.

130. In the *NPRM*, we proposed to include in our EEO Rule language clarifying that it is not intended to require that any person be given preferential treatment based on race, color,

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[198] Letter from Aida Alvarez, Administrator, U.S. Small Business Administration, to Roy Stewart, Chief, Mass Media Bureau, Federal Communications Commission (January 19, 2000).

[199] *See* Section 73.2080(c)(4), as set forth in Appendix C hereto.

national origin, religion, or gender. We will adopt this language to clarify the intent of our EEO Rule.[200]

131. In the *NPRM*,[201] we discussed the option of requiring that the number of recruitment sources be tailored to the size of the local minority labor force. In light of the flexible recruitment program we are adopting, we find it unnecessary to adopt this proposal. We also asked whether we should continue our prior practice of not requiring the filing of EEO recruitment information concerning minorities in markets where the minority labor force is less than five percent.[202] We conclude that this practice is no longer justified because our EEO Rule emphasizes broad and inclusive outreach rather than recruitment methods that specifically target minority and female applicants. Accordingly, we will discontinue this practice.

132. MMTC urges that we should expand the scope of our broadcast EEO Rule to include headquarters offices. It notes that EEO rules applicable to cable entities apply to headquarters offices. However, the inclusion of headquarters offices in the cable EEO rules is the result of a statutory requirement.[203] There is no similar statutory requirement applicable to broadcasters. The issue of whether we can or should extend the scope of our broadcast EEO Rule to encompass entities other than licensees is beyond the scope of this proceeding.

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[200] *See* Section 73.2080(c)(1), as set forth in Appendix C hereto.

[201] *NPRM*, 13 FCC Rcd at 23028 (para. 66)

[202] *Id.* at 23028 (para. 68).

[203] *See Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable Communications Act of 1984*, 102 FCC 2d 562, 566-67 (1985).

133. Some commenters suggest that we should accept compliance with OFCCP requirements as compliance with our EEO Rule in the case of those broadcasters subject to those requirements. We will not adopt this proposal. OFCCP regulations place a general nondiscrimination requirement on entities with federal contracts in excess of $ 10,000.[204] The regulations require an "affirmative action compliance plan" for employers who have 50 or more employees and federal contracts of $ 50,000 or more.[205] Enforcement of the plans is based primarily on compliance evaluations that may occur at the discretion of OFCCP.[206] The requirements of OFCCP differ in scope and enforcement mechanisms from the EEO Rule we are adopting herein. It would be confusing to the public to have a separate agency with separate requirements responsible for the EEO outreach efforts of some broadcasters. It would also be counterproductive to our desire to encourage joint industry efforts to develop effective recruitment methods if some segments of the industry were not subject to our EEO Rule. Moreover, adoption of this proposal would greatly complicate enforcement of our rules by making it necessary for us to consider complaints based on alleged violations of the requirements of another agency, or to deal with situations where a broadcaster that has claimed exemption based on OFCCP compliance is later found by OFCCP not to be in compliance with its requirements. Finally, we do not believe that our EEO Rule will create significant duplication. A broadcaster may, of course, claim credit for steps taken to comply with OFCCP requirements if they also serve to establish compliance with our EEO Rule.

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[204] *See* 41 C.F.R. §§ 60-1.4 and 60-1.5

[205] *See* 41 C.F.R. § 60-1.40 and Part 60-2.

[206] *See* 41 C.F.R. § 60-1.20.

134. Enforcement. Some broadcast representatives argue that a mandatory EEO program is unnecessary,[207] that it is duplicative of the EEOC,[208] or that it is too vague a standard to enforce.[209] However, many commenters assert that the best way to ensure that broadcasters implement viable EEO practices in their recruitment programs is for the Commission to enforce mandatory EEO provisions.[210] MMTC argues that, in the past, voluntary efforts to integrate public schools and businesses failed and statutes were necessary to prevent discrimination.[211] MMTC also maintains that, before the Commission adopted its EEO Rule, the broadcast industry had 40 years to provide equal opportunity voluntarily but failed to do so and that the industry commenters to the *NPRM* could have voluntarily implemented many of their proposals over the last 30 years since the EEO Rule was adopted but have not done so.[212] In addition, MMTC asserts that enforcement of mandatory provisions will not prevent any broadcaster from implementing a voluntary program that carries out steps that go beyond Commission EEO

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[207] S&B Comments at 23.

[208] TAB Comments to *Streamlining* at ii.

[209] HBP Comments at 7.

[210] MMTC Comments at 31; MMTC Reply Comments at 26; UCC Comments at 5; AFTRA Comments to *Streamlining* at 1; NOW Comments at 3. NOW also argues in its Reply Comments at 6 that the Commission needs to continue its own EEO enforcement instead of relying on other agencies because only the Commission possesses expertise in regulating the broadcast industry and is concerned with issues such as diversity of programming, which do not concern the EEOC and other entities that focus on specific instances of discrimination.

[211] MMTC Comments at 31.

[212] MMTC Reply Comments at 32.

requirements.[213] As part of its proposal for a "zero tolerance policy," MMTC urges that we should more carefully Identify habitual EEO violators, broaden and improve the effectiveness of our inquiry procedures, and not wait eight years until renewal time to assess EEO compliance.[214] In order to ensure that licensees will comply with the requirements of the EEO Rule, we believe that certain enforcement provisions are necessary and we outline them below.

135. NAB proposes that stations be required to certify compliance with the Commission's EEO Rule every two years and to maintain documentation that proves they have properly certified their compliance.[215] NAB also suggests that licensees should make the supporting documentation available to the Commission for its review but that the public file should contain only the compliance certification and no supporting documentation.[216] AWRT suggests that broadcasters should evaluate their EEO programs at least every two years and should file a report at least every four years that covers at a minimum the previous year's EEO efforts.[217] AWRT states that, by requiring reports at least every four years, broadcasters would be filing EEO efforts reports at mid-term and at the time they file for renewal.[218] Our new requirements for a Statement of Compliance and for radio station mid-term reviews,

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[213] MMTC Comments at 36.

[214] MMTC Comments at 278.

[215] NAB Comments at ii; NAB Reply Comments at 14.

[216] NAB Comments at iii.

[217] AWRT Comments at 9.

[218] *Id.*

described below, incorporate aspects of both of these proposals, as well as MMTC's "zero tolerance" policy.

136. Every two years, except in the renewal year when all broadcast licensees will file a Broadcast Equal Employment Opportunity Program Report (Form 396), all television and radio licensees that are part of an employment unit with five or more full-time employees will be required to review their EEO programs and file with the Commission a Statement of Compliance indicating whether they have complied with the Commission's EEO Rule during the two-year period prior to the date of the Statement. The Statement will be a new form (FCC Form 397, described more fully in the section of this *Report and Order* dealing with forms). If a station believes that it was not, or may not have been, in compliance, we will require that it submit an appropriate explanation. Licensees will file the Form 397 every second, fourth and sixth year of the license term on the anniversary of the date that they are due to file for renewal of their licenses, resulting in the filing of three Statements of Compliance during a license term. Form 397 will require a statement as to the approach the broadcaster intends to use during the next two-year period and broadcasters may change their election between the two approaches (supplemental recruitment measures or alternative recruitment program) at the time they file Form 397. Requiring filing of a Statement of Compliance periodically during the license term will encourage licensees to evaluate their EEO efforts on an ongoing basis instead of only at renewal time. It will also encourage compliance with the EEO Rule on a continuing basis instead of only at the end of an eight-year license term, substantially fulfilling that aspect of MMTC's zero tolerance policy urging that the Commission engage in enforcement efforts throughout a license term as well as at renewal time.[219]

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[219] MMTC Comments at 333.

137. In the eighth and final year of their license term, along with their renewal application, all broadcast licensees will file Form 396, indicating whether they have complied with the outreach provisions of the EEO Rule, attaching a copy of the station's EEO public file report covering recruitment activity for full-time positions during the previous year, and providing a narrative statement in which they describe how the station achieved broad and inclusive outreach. Broadcasters may also change their election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach at the time they file their renewal applications. Form 396 will also require a statement as to the approach the broadcaster intends to use during the next two-year period.

138. In the *NPRM*, we requested comment on a new standard for mid-term review of television licensees' employment practices.[220] The previous mid-term review standard required a station to compare its employment profile with the applicable labor force, a practice that we are discontinuing in response to the *Lutheran Church* decision. We disagree with NAB's argument that Congress is the appropriate entity to determine the new standard for mid-term review.[221] Section 334 of the Communications Act states that the Commission shall "require a mid-term review of television broadcast station licensees' employment practices...." Congress left the standard of review for mid-term reviews to the Commission's discretion and the Commission fashioned the previous mid-term review standard. Therefore, the Commission is required by statute to conduct mid-term reviews and to fashion an appropriate review standard, and we have the authority to change the standard of

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[220] *NPRM*, 13 FCC Rcd at 23030 (para. 76).

[221] NAB Comments at 29.

review without first seeking Congressional approval. Although several commenters made suggestions regarding the mid-term review,[222] we believe that the process that we have selected is the most appropriate, providing us with ample information to assess a licensee's EEO program, while not being overly burdensome to licensees.

139. We also believe that, in light of the longer eight-year license terms currently in effect, it is appropriate to extend the mid-term review process to radio station employment units with more than ten full-time employees. This will facilitate more frequent monitoring of the effectiveness of a station's EEO efforts both by the station itself and by the Commission and the public. In this respect, we concur with the proposal in MMTC's zero tolerance policy that review of EEO efforts should not be limited to renewal time.

140. We agree with MMTC that, to ensure effective Commission enforcement, mid-term reviews should be "more than mere box-checking."[223] Accordingly, we will require that station employment units subject to mid-term review file with Form 397 the EEO public file report covering recruitment activity for full-time positions during the previous year, or from the date the licensee acquired the station, if less than a year. This mid-term filing will be due four years after the date the most recent renewal application was due to be filed. Mid-term reviews will be based on review of the Statement of Compliance, including review of the data contained in the EEO public file report filed at the time of the mid-term review.

141. Because the filing dates for the Statements of Compliance and EEO public file reports are tied to the date of

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[222] NAB Comments at 29; AWRT Comments at 3-5.

[223] *NPRM*, 13 FCC Rcd at 23030 (para. 76).

filing of renewal applications, the due dates will apply to a given station regardless of when the licensee acquired the station. Consequently, if there is a substantial change of ownership requiring approval pursuant to FCC Form 314 or FCC Form 315 during the two-year period to be covered by a Statement of Compliance or during the one-year period covered by an EEO public file report, the new licensee will file the Statement and the report by the due date. However, when determining the bases for the Statement and the EEO public file report, the new licensee will consider only the recruitment efforts it conducted concerning full-time positions during the period it controlled the station. Thus, in these cases, the period covered by the Statement of Compliance may be less than two full years and the period covered by the EEO public file report may be less than one full year. Likewise, a mid-term review may cover a period of less than one year, because the mid-term review will cover only the licensee's recruitment efforts concerning full-time positions during the period it controlled the station, if less than a year.

142. If a station is subject to a time brokerage agreement, the licensee's Statement of Compliance, Form 396 and EEO public file report will include data concerning only its own recruitment efforts for full-time positions and not the efforts of the broker. If a licensee is a broker of another station or stations, however, its recruitment activity concerning full-time positions at the brokered station(s) should be included in the data on which the licensee-broker's own Statement of Compliance, Form 396 and EEO public file report are based concerning its own station. If a licensee-broker owns more than one station, it shall include its recruitment activity concerning full-time positions at the brokered station in the Statements of Compliance, Forms 396 and EEO public file reports for its own station that is most closely affiliated with, and in the same market as, the brokered station. If a licensee-broker does not own a station in the same market as the brokered station, then it shall include such

information in the Statements of Compliance, Forms 396 and EEO public file reports for its own station that is geographically closest to the brokered station.

143. The first Statement of Compliance after the effective date of this *Report and Order* will be due June 1, 2000, to be filed by television stations in the District of Columbia, Maryland, Virginia, and West Virginia, whose licenses expire on October 1, 2004. At that time, as part of the mid-term review process, they will also be required to file a copy of their EEO public file report concerning positions after these rules become effective. The first Statement of Compliance for radio stations will be due on June 1, 2001, to be filed by radio stations in the District of Columbia, Maryland, Virginia, and West Virginia, whose licenses expire on October 1, 2003. Thereafter, television stations in the December 1, 2004, renewal group will file Statements by August 1, 2000, and radio stations in the December 1, 2003, renewal group will file by August 1, 2001, and so on for all television and radio renewal groups. As we begin this system, the earliest Statements will cover less than two full years. Licensees filing Statements of Compliance at the beginning of the implementation of this new EEO Rule and licensees who acquire stations during a license term may reasonably pro-rate their use of recruitment menu items based on the period of time actually available if their Statement of Compliance would be based on less than a full two-year period. For example, if a licensee acquired a station only a year before a Statement of Compliance for that station was due, a licensee would be expected to have undertaken only two menu options during that time period. Further, licensees filing Statements of Compliance during the initial two year period after our Rule becomes effective need only certify as to their compliance since the effective date of the Rule, rather than the period of two years specified in the form. Also, in the case of licensees subject to mid-term review during the first year after our Rule becomes effective, the EEO public file report accompanying the

Statement of Compliance need only include information concerning activities since the effective date of the Rule, rather than the full year ordinarily covered by the EEO public file report. The effective date of the Rule will be determined as set forth in paragraph 235, below.

144. The Statement of Compliance, EEO Public File Report and Form 396 should be based on recruitment efforts documented in items contained in a station's own records. The Commission's broadcast public file rules, 47 C.F.R. §§ 73.3526 and 73.3527, will be amended to require licensees to maintain copies of their most recent Statement of Compliance. Also, each year on the anniversary of the date a licensee is due to file its renewal application(s), it must place in its public file a copy of its EEO public file report. In addition, a station should retain any records necessary to document its recruitment efforts, depending on the approach the station has chosen, even though the records will not be required to be placed in the public file or filed with the Commission on a regular basis.[224] As part of an inquiry, the Commission may request information from the licensee in addition to that contained in the public file, as described below. These records could include copies of letters notifying sources of job openings, copies of the station's job listings in newspapers or on web sites, and, if applicable, copies of requests by community organizations that they be notified of openings and copies of notices sent to them, information verifying participation at job fairs, and other similar types of outreach information.

145. We agree with several commenters who favor random and/or targeted inquiries by the Commission to verify compliance with the EEO Rule and we will substantially

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[224] MTC proposes that the Commission should require licensees to maintain records sufficient to allow a meaningful ascertainment of whether a station complied with the EEO Rule. MMTC Comments at 219.

implement those recommendations.[225] Thus, in order to verify compliance with the EEO Rule and the accuracy of the Statement of Compliance, Form 396 and the EEO public file report, the Commission may send inquiries to licensees. The Commission may at random conduct an inquiry of a licensee requesting information relating to the licensee's compliance with the EEO Rule. In addition, we will perform random audits, including on-site audits.[226] Specifically, each year we will randomly select for audit approximately five percent of all licensees in the radio and television services, ensuring that, even though the number of radio licensees is significantly larger than television licensees, both services are represented in the audit process. We may also conduct an inquiry if the Commission has evidence of a possible violation of the EEO Rule. Initially, the inquiry may request the contents of the station's public file. Further inquiry or inquiries may be conducted requesting additional documentation of recruitment efforts that is not in the public file. As part of its zero tolerance policy, MMTC urges that we should improve the effectiveness of our inquiries.[227] We agree. Based on the circumstances of the case, the inquiry could potentially include 1) a request for data covering any period of the license term; and 2) interviews of witnesses, including any complainant and present or former station employees.

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[225] NAB Comments at 15; NAB Reply Comments at 14; 46 Named StBAs Comments at 27; UCC Comments at 18; AWRT Comments at 11. Fisher suggests that the Commission should be authorized to inquire about licensees' recruitment efforts but states that this should be done only at renewal time unless circumstances warrant further scrutiny. Fisher Reply Comments at 11.

[226] We anticipate that the number of random/inquiries will not exceed five percent of employment units annually.

[227] MMTC Comments at 278.

146. Licensees will be subject to a variety of sanctions and remedies for EEO Rule violations or deficiencies. Such violations or deficiencies might include, for example: engaging in discrimination; failure to file a Statement of Compliance when due; failure to file an EEO public file report when due; failure to file Form 396 when due; misrepresentation of outreach efforts or other information; non-responsiveness or evasion in responding to a written Commission inquiry; failure to recruit for all vacancies absent exigent circumstances; failure to widely disseminate information concerning vacancies for full-time positions; and failure to analyze routinely the adequacy of the various program elements in achieving broad outreach to all segments of the community. In the case of broadcasters which elect the supplemental recruitment measures options, violations or deficiencies would also include failure to undertake the required options listed in the supplemental recruitment measures menu; and failure to notify organizations that request vacancy notices. Also, it may constitute a violation of the EEO Rule if, based on all of the evidence, we determine that a licensee has attempted to evade our requirements, through token or sham efforts, including, but not limited to situations where there is evidence that EEO efforts were not initiated until the final 12 months of the license term. Sanctions and remedies that may be issued by the Commission for deficiencies in licensees' EEO compliance include admonishments, reporting conditions, forfeitures, short term renewal of license, or designation for hearing for possible revocation of license or denial of renewal. The appropriate sanction or remedy will be determined on a case-by-case basis. Sanctions will be greater in cases involving recidivism or continuous EEO non-compliance, and, based on the facts of each case, could raise a question of intentional discrimination. In sum, as suggested in MMTC's zero tolerance policy, we intend to carefully monitor compliance with our EEO Rule to uncover attempts to evade

our requirements or egregious violations that may suggest discrimination.

147. The public may file complaints throughout the license term based on the Statement of Compliance or the contents of the public file. Complaints raising a properly documented question of a violation of the EEO Rule will be investigated or referred to the EEOC, as appropriate, immediately, not just at the end of the license term. The public may also file an informal objection or petition to deny an application based on EEO violations. The rules and policies already in place concerning settlements of petitions to deny and threats to file such petitions, as delineated in 47 C.F.R. §§ 73.3588 (petitions) and 73.3589 (threats to file), and *Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989), will continue to be applied.

148. Sunset. Some commenters urge the Commission to sunset its EEO rules at some time. The Commission's EEO regulations help to ensure that all qualified persons will continue to have an equal opportunity to compete for job openings. Broad and inclusive outreach measures help to deter discriminatory practices, by providing everyone with a chance to be considered for hiring opportunities. Congress has made its intent clear that we should enforce outreach and nondiscrimination requirements for broadcast television providers, cable television providers and MVPDs, and we believe that such requirements are equally necessary for radio broadcasters, as discussed above. As we must honor congressional intent and cannot, in any event, predict when discontinuance of EEO regulations may be warranted, we will not establish in advance a date on which our EEO regulations will sunset.

ii Religious Broadcasters

149. As we stated in the *NPRM*, we believe it appropriate to codify in our EEO Rule that religious broadcasters may establish religious belief or affiliation as a qualification for all radio station employees.[228] Religious broadcasters who establish religious affiliation as a qualification for a job position will not be required to comply with the FCC's specific recruitment requirements for that position.[229] Rather, they will be expected to make reasonable good faith efforts to recruit widely among their co-religionists. This approach acknowledges that the more specific recruitment requirements set forth above may not be suited to recruitment limited to members of a certain faith. With respect to television station employees, we will continue to allow religious broadcasters to establish religious belief or affiliation as qualification as a nonbinding policy, rather than a rule, due to the limitations imposed by Section 334 of the Communications Act. Although, as discussed above, we do not believe that Section 334 prevents us from adopting new EEO program requirements to replace those invalidated by the court in *Lutheran Church*, that section does prevent us from revising the nondiscrimination requirement, which was not invalidated, as applied to television licensees.

150. In keeping with *Streamlining Broadcast EEO Rule and Policies*, 13 FCC Rcd 6322 (1998) ("Order and Policy Statement"), we proposed to define a religious broadcaster as a licensee that is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity.[230] Should a question arise as to whether a broadcaster falls under this definition, we proposed to make an

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[228] *NPRM*, 13 FCC Rcd at 23028 (para. 70).

[229] *Id.* at 23029 (para. 71).

[230] *Id.*

individual determination based upon an evaluation of the religious entity's characteristics, including whether the entity operates on a nonprofit basis, whether it has a distinct religious history, and whether the entity's articles of incorporation set forth a religious purpose.[231]

151. We have determined to follow the EEOC's approach and adopt our original proposal which contemplates individual case-by-case review with multi-factor analysis whenever a question arises as to whether a licensee is eligible to claim religious broadcaster status. Courts have held that such initial determinations are necessary in order to determine if entities can avail themselves of religious exemptions, and must be performed on an individual case-by-case basis.[232] Accordingly, we shall adopt our proposed definition of religious broadcaster as part of the anti-discrimination section of the EEO Rule.

152. In all cases, however, we will allow broadcasters to determine for themselves in the first instance if they qualify for religious broadcaster status. In this respect, we will rely on a licensee's good faith claim to religious broadcaster status. If a situation were to arise where we examine a licensee's claim to religious broadcaster status and disagree that a licensee qualifies as a religious broadcaster, for purposes of this rule, we will apply such a ruling prospectively as long as the broadcaster's claim to religious status was made reasonably and in good faith. Thus, no licensee whose claim that it qualifies as

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[231] *Id.*

[232] *See EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 618 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) ("*Townley*") (determination of whether a corporation qualifies as "religious" in order to be exempt from Title VII is to be done on a case-by-case basis by weighing all significant religious and secular characteristics to determine whether a corporation's purpose and character are primarily religious).

a religious broadcaster is made reasonably and in good faith will be penalized retroactively under this rule.

153. With respect to the *NPRM*, we terminated MM Docket No. 96-16, with the exception of the petition for reconsideration filed by ACLJ in response to *Order and Policy Statement*. We note that one of the bases for the petition was that *Order and Policy Statement* lacked a proper notice and comment period prior to its adoption. That issue was rendered moot with the issuance of the *NPRM* which requested comments on the policy adopted in *Order and Policy Statement*. The petition further contended that the recruitment requirements of our EEO Rule at that time violated *Adarand*. This issue was also rendered moot with the release of the *Lutheran Church* decision. With respect to the petition's other issues, ACLJ has filed up-to-date comments in this proceeding which address those same issues. Accordingly, we will dismiss ACLJ's petition for reconsideration and consider its comments in this *Report and Order*.

154. In response to comments filed by the Church State Council of Seventh Day Adventists (Adventists), the religious liberty and public policy arm of the Adventist Church in a five-state western region, and the American Center for Law and Justice (ACLJ), we clarify that religious broadcasters are not required to demonstrate the validity of a religious qualification as applied to each vacancy at their stations.[233] As we indicated in the *NPRM*, religious broadcasters may use religious belief or affiliation as a qualification for all vacancies, unless they themselves determine otherwise.[234] It is the licensee that makes this determination.

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[233] ACLJ Comments at 13-17 (legal and educational organization which preserves religious freedom).

[234] *NPRM*, 13 FCC Rcd at 23028-29 (paras. 70-71).

155. ACLJ submits that, under our proposal, religious broadcasters would still be required to complete and maintain "virtually identical" EEO forms that were required prior to the *Lutheran Church* decision.[235] ACLJ asserts that under *Lutheran Church*, these compliance requirements are inherently unconstitutional and burdensome.[236] As indicated below, we have revised our forms to address these concerns. Nonetheless, filing EEO forms is part of the normal duties of all who are granted broadcast licenses by the Commission. It has long been established that all broadcast licenses come with enforceable public obligations.[237]

156. ACLJ also claims that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, et seq., prohibits government imposition of recruitment standards on religious organizations. The RFRA prohibits "government" from "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[238] We reject ACLJ's argument that application of the FCC's EEO regulations violates the RFRA. The application of our EEO Rule will not substantially burden the exercise of religion since religious broadcasters are not required to comply with our specific recruitment requirements

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[235] ACLJ Comments at 11-12.

[236] *Id.* at 12, citing *Lutheran Church* (citation omitted).

[237] *See Office of Communication*, 359 F.2d at 1003 (Once a broadcaster has sought and been granted an FCC license, the license it receives carries enforceable public obligations.).

[238] 42 U.S.C. § 2000bb-1.

for vacancies with a religious qualification.[239] Indeed, the very purpose of our Rule's religious qualification exemption was to ensure that religious broadcasters would not be burdened by impermissible governmental interference when conducting their religious affairs.[240] Further, ACLJ did not demonstrate that the RFRA is applicable to our EEO Rule when applied to religious institutions that choose to be licensees of broadcast stations.[241] We note that the Supreme Court has held that the RFRA is unconstitutional as applied to state action, but has not yet reached the issue of constitutionality with respect to federal action, as is the case here.[242]

157. National Religious Broadcasters (NRB), a national association of radio and television broadcasters that fosters and encourages the broadcasting of religious programming, fears that Commission consideration of whether a licensee has a distinct religious history for purposes of determining eligibility for religious broadcaster status would discriminate against some religious entities that are not as well-established as others.[243] We clarify that demonstrating "distinct religious history" is not a sole determining factor, and as indicated in the NPRM, is only

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[239] *See also Tony and Susan Alamo Foundation v. Sect. of Labor*, 471 U.S. 290, 305-6 (1985) ("The recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs.").

[240] *Order and Policy Statement*, 13 FCC Rcd at 6324.

[241] *See Scott v. Rosenberg*, 702 F.2d 1263, 1275 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984) (When churches decide to acquire television and radio stations, they avail themselves of facilities which, under congressional mandate, must be operated in the public interest.).

[242] *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

[243] NRB Comments at 5-6.

one of several factors to be considered when determining religious broadcaster status.

158. Several commenters argue that the *NPRM*'s consideration of a licensee's nonprofit operations for purposes of determining religious broadcaster status would unfairly prevent all for-profit religious broadcasters from claiming the religious qualification for their stations' vacancies. Accordingly, they request that we eliminate nonprofit status as a determining factor.[244] However, Americans United for Separation of Church and State (Americans United), argues that under Title VII, the Supreme Court has permitted employment on the basis of religion only with respect to the nonprofit activities of religious employers, so that our definition of religious broadcaster should not include for profit religious organizations.[245] We clarify that nonprofit status is not a sole determining factor and, as indicated in the *NPRM*, is only one of several factors to be considered when determining religious broadcaster status.[246] Accordingly, a licensees's lack of nonprofit status will not automatically disqualify it from claiming religious broadcaster status. Also, although the Supreme Court has held that applying a Title VII exemption to a religious organization's nonprofit activities does not violate the Establishment Clause, the Court emphasized that its decision did not address for-profit

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[244] NRB Comments at 4-5; Christian Legal Society's Center for Law and Religious Freedom, Concerned Women for America and Focus on the Family (CLS) Comments at 17-18 (organizations concerned with the protection of fundamental religious liberties); Crawford Broadcast Company (CBC) Comments at 2 (owner of 25 stations with religious formats).

[245] Americans United Reply Comments at 3-6.

[246] *NPRM*, 13 FCC Rcd at 23029 (para. 71) (Other determining factors include an entity's distinct religious history and whether the entity's articles of incorporation set forth a religious purpose.).

activities.[247] Therefore, we believe it premature to eliminate nonprofit status as a determining factor. Further, courts have considered nonprofit status in determining if an organization is secular or religious in nature.[248]

159. Several commenters express concern that the *NPRM* allegedly defines "religious broadcaster" so as to exclude many religious broadcasters, particularly nondenominational evangelical Christians, who are not associated with any particular church.[249] Some commenters recommend that the *NPRM*'s definition be expanded to include broadcasters who air substantial amounts of religious programming.[250]

160. We clarify that a religious broadcaster is not required to affiliate with a church or a specific denomination in order to qualify under our EEO Rule and policy as a "religious broadcaster." As we stated in the *NPRM*, we define a religious broadcaster as a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity.[251] We included the term "religious entity" in addition to "church" or "synagogue" in recognition of the fact that not all religious entities consist of formal churches or organized religions.

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[247] *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987).

[248] *See Townley* at 619 (The court held the for-profit status of a company to be a secular characteristic.).

[249] Adventists Comments at 1; Good News Radio Comments at 6 (licensee of broadcast station in California); Americans United Reply Comments at 6-7; CLS Comments at 19-20.

[250] CLS Comments at 28; NRB at 6; CBC Comments at 3. UCC also concurs with NRB. See UCC Reply Comments at 24-25.

[251] *NPRM*, 13 FCC Rcd at 23029 (para. 71).

Should a question arise as to whether a licensee constitutes a religious entity, we propose to evaluate the entity's characteristics, including, inter alia, a religious purpose in the articles of incorporation and a distinct religious history.[252] These factors apply to both church affiliated and nondenominational religious broadcasters. Accordingly, commenters' concerns that nondenominational licensees cannot qualify for religious broadcaster status are unwarranted.

161. We will not add the airing of religious programming alone as an alternative ground for treatment as a religious broadcaster under our EEO Rule and policy. Our religious qualification is for licensees that are religious broadcasters, not for licensees that air religious programming. Indeed, any licensee may air religious programming for any reason.[253] However, we realize, based on comments, that religious broadcasters may air religious programming as part of their religious purpose. Therefore, we will consider religious programming as an additional factor to consider on a case-by-case basis when determining religious broadcaster status.[254]

ii Delegated Authority

162. In the *NPRM*, we proposed to delete certain language in Section 0.283 of the Commission's Rules, which requires the Chief of the Mass Media Bureau to refer certain matters to the

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[252] *Id.*

[253] *See Speer v. Presbyterian Children's Home and Service Agency*, 847 S.W.2d 227, 237 (Texas 1993) ("To be a religious corporation, an entity must actually act to further its religious purpose.").

[254] *See also Townley, supra* (For purposes of determining whether an entity was eligible to claim a religious exemption from Title VII, the court considered, among other things, if the entity produced a religious or secular product.).

Commission for disposition.[255] Specifically, Section 0.283(b)(1)(iii) directs all petitions to deny, informal objections and other petitions against television and radio broadcasting applications for new or modified facilities or for renewal, assignment or transfer of control to be referred to the Commission if "*the applicant in question falls outside the applicable processing criteria in its employment of women and minorities.*"[256] Since use of the processing criteria, which involved a comparison of a station's employment profile with the local labor force, is inconsistent with the Lutheran Church decision, we proposed to amend this section by deleting its reference to the criteria and deleting the above-quoted phrase in its entirety. There were no comments filed specifically addressing this proposal. Accordingly, we will adopt the proposed amendment. We note that the Mass Media Bureau Chief is still required to refer to the Commission the above-cited petitions to deny and informal objections if the document "presents documented allegations of failure to comply with the Commission's Equal Employment Opportunity rules and policies," and to refer to the Commission "all forfeiture matters relating to the Commission's equal employment opportunity rules..."[257]

b. Forms

163. In a Memorandum Opinion and Order issued on September 30, 1998, the Commission suspended the requirement that television and radio broadcast licensees file Form 395-B until further notice while it considered adoption of new EEO rules that address concerns of the court in *Lutheran*

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[255] *See* 47 C.F.R. § 0.283.

[256] 47 C.F.R. § 0.283(b)(1)(iii).

[257] 47 C.F.R. § 0.283(b)(1)(iii) and (c)(3), respectively.

Church and made any appropriate changes to its data collection procedures.[258] As discussed above, we have concluded that the *Lutheran Church* decision does not undermine our authority to require broadcasters and cable entities to submit minority and female employment information to enable us to monitor industry employment trends. We sought comment in the *NPRM* on our belief that these data serve as a useful indicator of industry trends, and also emphasized that this information would not be used for screening or assessing compliance with our EEO requirements. We also invited comment on our proposal to eliminate various sections of the form, including comparisons of employment statistics with local labor force statistics, and part-time employment data. Several commenters addressing this issue agree that the Commission should continue to collect this information to analyze industry employment trends.[259]

164. We hereby reinstate the requirement that licensees file Form 395-B to enable the Commission to monitor industry trends and report to Congress. We believe that it is particularly

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[258] *See Suspension Order*, supra.

[259] *See* Camrory Comments at 7-8 (this view is predicated on the Commission's assurance that the information will not be used to assess compliance CRB Comments at 11-12 and TCI Comments at 16-17 (commenters generally favor this process but believe that the Commission should revise Form 395-A); NOW Comments at 28 (the Commission has the authority to impose this requirement, and should continue to collect such data); AWRT Comments at 8 (the key to understanding the appropriate approach to EEO is data collection); NHFA Comments at 15 (this information is of great use to the Commission in tracking industry trends, but these forms should be modified to require minority and female ownership information); AFTRA Comments at 7 (the Commission has the authority to continue to collect and use data to analyze industry trends); MMTC at 241 (Form 395 data should be used only to evaluate whether reconfiguring of Commission enforcement resources, revision of EEO requirements or sunsetting are appropriate).

important for us to collect this data in order to monitor industry trends during the next several years because the EEO requirements and enforcement mechanisms that we adopt today differ in significant respects from those we have employed in the past. Thus, we need to monitor industry trends in order to assess, on an industry-wide basis, the effectiveness of the new rules in achieving our objectives of inclusive outreach and deterring discrimination. For example, an increase in the number of women and minorities employed in the broadcast and cable industries would indicate that our EEO requirements are effective in ensuring outreach. We emphasize that we will not hesitate to propose changes to these EEO rules if industry trends suggest that the rules are not effective. We note that Congress has evidenced interest in and relied on this employment trend data in the past. As noted above. Congress cited the Commission's employment trend reports in the legislative history of the 1992 Cable Act as evidence that barriers to employment of women and minorities continued to exist, and that additional legislative action was warranted[260]. And Section 22(g) of the 1992 Cable Act required the Commission to report back to Congress on the effectiveness of [the Commission's] EEO regulations and recommend whether further legislative action was needed.[261] We do not believe that our obligation to monitor the effectiveness of our EEO regulations and procedures ended when we complied with that particular statutory requirement. We have a continuing responsibility to assess whether our policies are working, and we must collect the data necessary to fulfill that

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[260] *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992).

[261] 1992 Cable Act, Section 22(g).

responsibility.[262] Thus, Congress clearly contemplated continued Commission monitoring of employment trends.

165. Under the annual employment report filing requirement that we reinstate today, broadcasters will be required to file Form 395-B by September 30 of each year. The Commission will use the data only in aggregated form for trend reports and to report to Congress. The Commission will not use the data for assessing an individual station's EEO compliance. In light of the purpose of the report, we amend Sections 73.3526(d)(7) and 73.3527(e)(7) of the Commission's Rules,[263] so that broadcast stations will no longer be required to retain copies of Form 395-B in the station's public file.

166. Some commenters argue that stations with 100 or more employees are already required to file an "Employer Information Report EEO-1" (EEO-1) annually with the EEOC, and that there is no need for the Commission to duplicate these efforts.[264] One commenter urges the Commission to permit broadcasters employing fewer than 100 employees to voluntarily file an EEO-1.[265] We will not adopt these proposals. Unlike the EEO-1, Form 395-B distinguishes between full and part-time employees and our broadcast trend reports only report

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[262] House Report No. 628 indicates that Congress expanded the number of upper-level job categories for which cable operators and MVPDs were required to report statistical information "to improve the Commission's ability to monitor industry employment trends and to evaluate the effectiveness of its rules and enforcement practices with regard to the representation of women and minorities in senior positions." H.R. Rep. No. 628, 102d Cong., 2d Sess. 111, 112 (1992)

[263] 47 C.F.R. §§ 73.3526(d)(7) and 73.3527(e)(7).

[264] *See* NAB Comments at 16; 46 Named StBAs Comments at 29; Evening Post Comments at 22.

[265] Fisher Reply Comments at 12.

full-time data. Therefore, even assuming that all stations that are part of an employment unit with five or more full-time employees filed the EEO-1, either voluntarily or because they were already required to do so, the data collected could not be compared to the employment data gathered for past Commission trend reports. OMB encourages us to "adopt procedures . . . that also could better utilize information collected via other mechanisms (such as other EEOC collections where possible)."[266] For the reasons discussed, we do not find the EEOC's collection mechanism compatible with our information needs and we are aware of no other similar data collection mechanisms. OMB also urges that we explore the use of surveys and other statistical sampling mechanisms to monitor industry trends, instead of requiring annual reports.[267] We have considered such alternatives. However, we use the data collected not only to monitor trends in the entire industry, but also to monitor trends in various subgroups, such as particular markets and services. These subgroups would likely be too small to generate useful results by surveys or sampling mechanisms. We note that we have provided relief to broadcasters in this area by, as discussed below, requiring broadcasters to file only one Form 395-B for all commonly owned stations in the same market that share at least one employee.

167. A few commenters criticize the process for obtaining employment data, and the classifications used for race and ethnicity classifications on Form 395-B.[268] One commenter objects to the methods stated in the instructions for Form 395-B on how to obtain data on race and ethnicity, and states that the

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[266] OMB Comments at 2.

[267] *Id.*

[268] Oxley/Hall Comments at 1-2; TAB Comments at 8.

government should not require prospective employers to make visual determinations as to race and ethnicity.[269] We disagree that the instructions on our annual employment reports require employers to guess race and ethnicity. It is only one suggested method for identification. Another suggested method is to obtain the information from employment records, where employees may have identified their race or ethnicity.

168. Another commenter complains that the Commission has had difficulty in defining the various racial and ethnic categories about which broadcasters must report.[270] Specifically, a commenter argues that, in 1998 Biennial Regulatory Review -- Streamlining *of Mass Media Rules, and Processes, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, the Commission acknowledged that the racial and ethnic standards for "minority" need to be elaborated.[271] The Commission is required to follow the standards issued by the OMB for classifying data on race and ethnicity.[272] On October 30, 1997, OMB issued modified standards to be used by federal agencies in race and ethnic data collections.[273] We will implement appropriate changes in Form 395-B, as well as Forms 395-A, and 395-M in the near future. For the time being, however, filers should continue to use the classifications defined in the current forms.

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[269] Oxley/Hall Comments at 1-2.

[270] TAB Comments at 8-9.

[271] See 13 FCC Rcd 23056 (1998).

[272] Race and Ethnic Standards for Federal Statistics and Administrative Reporting, OMB Statistical Policy Directive No. 15.

[273] Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (1997).

169. We maintain our current threshold for the filing of annual employment reports. Therefore, we will continue to require stations that are part of an employment unit with five or more full-time employees to file a Form 395-B. Thus, the smallest stations will continue to be exempt from this requirement.

170. As proposed in the *NPRM*,[274] we will require licensees to file one 395-B for all commonly owned stations in the same market, including AM/FM combinations, that share at least one employee. We believe that this change will afford relief to broadcasters by enabling them to file only one Form 395-B for all commonly owned stations sharing at least one employee. Only one commenter addressed this issue, and expressed general support for this change.[275] The *NPRM*[276] also raised the possibility of requiring licensees to file one Form 395-B for all commonly owned stations in the same market even if they share no employees. No commenter addressed this issue and we find no basis for adopting such a requirement.

171. With respect to the reporting of part-time employees, we do not believe that the Communications Act permits us to eliminate the requirement that part-time employment data for television stations be reported on the Form 395-B.[277] Because we want the requirements for radio and television stations to be as consistent as possible, we will continue this requirement for all broadcasters. In addition, for the reasons stated above in the

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[274] *NPRM*, 13 FCC Rcd at 23034 (para. 89).

[275] MMTC Comments at 185, n.316.

[276] *NPRM*, 13 FCC Rcd at 23034 (para. 89).

[277] *See* 47 U.S.C. Section 334(a)(2). Although the statute concerns forms filed by television licensees, we have always used the same forms and required the same data for radio licensees as for television licensees.

broadcast recruitment section, we will continue to require the reporting of all full-time employees, including lower-level employees, on the Form 395-B.

172. The "Broadcast Equal Employment Opportunity Program Report" (Form 396) will be modified to reflect the new EEO Program requirements we adopt in this proceeding. With the revisions described below, we reinstate the requirement that licensees file a Form 396 with their renewal applications.[278] The Form 396 will continue to be filed with the licensee's renewal application and licensees will be required to list the call sign and location of all commonly owned stations which share one or more employees on the same form. The form will also include a section for licensees to specify any stations operated pursuant to a time brokerage agreement. Recruitment efforts conducted for brokered stations should be reported as explained above. In addition, all stations, including those that are part of an employment unit with fewer than five full-time employees, will be required to report whether any employment discrimination complaints have been filed, and the current status of any such complaints.

173. The new Form 396 will continue to include a box in which a licensee may indicate whether it is part of an employment unit that employs fewer than five full-time employees. Such licensees would report the existence and details of any discrimination complaints, complete a certification, and file the form with the Commission. Given that our EEO Rule emphasizes broad and inclusive outreach and does not require recruitment methods that specifically target minority or female applicants, we do not find it necessary to grant a filing exemption based on the size of the available minority labor force. Therefore, we delete the box on Form 396

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[278] The Commission suspended the Form 396 filing requirement in Suspension Order. 13 FCC Rcd at 21998.

that permitted licensees located in areas with minority labor forces of less than five percent an exemption from filing EEO program information.[279] Licensees of stations that are part of an employment unit with five or more full-time employees will be required to indicate on the Form 396 whether they have complied with the Commission's EEO Rule outreach requirements for the two-year period prior to the date they file for renewal. Form 396 will also require information as to the licensee's election for the next two-year period between the two recruitment approaches. In addition, these licensees will be required to attach to Form 396 the public file report from the previous year. As discussed above, the EEO public file report will contain information concerning all full-time vacancies during the covered period, all recruitment sources contacted and all other recruitment measures used, and additional information depending upon the recruitment option selected by the broadcaster. Generally, this approach is consistent with the proposals concerning reporting made by some commenters.[280]

174. We have eliminated sections pertaining to local labor force statistics, and alternative labor force statistics, from Form 396 because we will no longer compare broadcasters' employment statistics with those labor force statistics. Also, to conform Form 396 to our new EEO program requirements, we have deleted sections concerning the number of minority or female hires and the number of recruitment sources contacted, and the number of minorities and women who have been promoted. We expect licensees to demonstrate that their recruitment efforts resulted in broad and inclusive outreach.

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[279] Correspondingly, we will delete the language in the instructions for Form 303-S ("Application for Renewal of License for AM, FM, TV, Translator, or LPTV [low power television] Station"), which indicated that such licensees needed to complete only the first two pages of Form 396.

[280] *See, e.g.*, NAB Comments at 14; 46 Named StBAs at 26.

Thus, Form 396 will include a new section (Section III) for licensees to provide a narrative statement justifying why they believe their program has been successful in widely disseminating information concerning job openings throughout their community. For example, licensees could demonstrate the success of their outreach efforts by showing the circulation of any newspapers used to advertise vacancies and any additional recruitment sources used to reach sectors of the community that may not have been adequately reached by the newspaper advertisement or describing in detail the results of the menu options that they undertook, if applicable. Licensees will be required to explain on Form 396 any difficulties experienced concerning their outreach efforts and their efforts to overcome those problems.

175. MMTC recommends several changes to the Form 396.[281] Specifically, MMTC suggests that: the form should request three years of data; headquarters data should be reported; the form should require licensees to identify a top management official responsible for EEO implementation; the terms applicant and interviewee should be carefully defined; recruitment data should be broken down by race, sex, and job category; referral sources should be Identified by name, frequency, and intensity of use; licensees should be required to thoroughly describe word-of-mouth recruitment practices to avoid discrimination; EEO complaints should be reported on a current and complete basis with regular updates; and the form should call for information on training and internships, and minority and female contractors. In addition, MMTC recommends that the form ask for "second generation" information such as the treatment of minorities and women after they have been hired, and should also include a section for a self-assessment narrative. MMTC also recommends that the

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[281] MMTC Comments at 243-62.

EEO Program Report ask whether the initiatives reported in the Program Report will be continued throughout the coming license term, or whether modifications or additions are contemplated. In addition, it also suggests that the EEO Program Report ask whether it is the station's policy to maintain contact with well qualified but unsuccessful applicants, and to stay in touch with minority and female former employees in order to engage them in the search for new employees. Finally, MMTC requests that the Form 396 ask licensees whether they have placed a binding arbitration agreement into effect, and should make clear that compulsory binding arbitration agreements violate the Commission's EEO policy.

176. The public file requirement and Statement of Compliance process we are adopting will provide more information that interested parties can use to monitor a broadcaster's compliance with our EEO requirements on a more frequent basis throughout the license term than was available under our former rule. We agree with MMTC that review of EEO compliance should not be limited to renewal time. We believe these new enforcement requirements will address several of MMTC's concerns and further the underlying goal of its proposed zero tolerance policy. We have nonetheless determined that broadcasters should have maximum flexibility in fashioning their EEO programs. Therefore, we will not ask them to provide details concerning the station's policy regarding contacts with unsuccessful applicants and whether the initiatives reported in the Program Report will be continued. Moreover, as we stated above, MMTC's proposal concerning compulsory binding arbitration agreements is beyond the scope of this proceeding. For the reasons stated above, we will not require licensees to report headquarters EEO program information in connection with renewal applications. While we have adopted several of MMTC's other suggestions concerning this form, we find that its remaining suggestions, such as

requesting three years of data, would be too burdensome to require routinely of all broadcasters.

177. Each television and radio licensee that is part of an employment unit with five or more full-time employees will be required to file with the Commission a "Statement of Compliance" (Form 397), every second, fourth and sixth year of the license term. On Form 397, licensees will be required to answer with a "yes" or "no" response whether they have complied with the Commission's EEO Rule during the two years prior to the date they file Form 397. Stations answering "no" to this question will be required to submit an explanation with Form 397. Midway through the license term, television licensees and radio licensees that are part of an employment unit with more than ten full-time employees will be required to file, with Form 397, their station's EEO public file report for the previous year.

178. The Commission hereby reinstates the requirement that a construction permit, assignment, or transfer applicant that proposes to be part of an employment unit that will employ five or more full-time employees file a "Model EEO Program" (Form 396-A), as part of its construction permit, assignment, or transfer application.[282] We have revised Form 396-A to conform with the EEO requirements that we adopt in this *Report and Order*. Among other things, the new Form 396-A will have revised instructions and questions in Section IV to clarify that recruitment measures should be broad and inclusive. In addition, to accord broadcasters flexibility in fashioning their EEO programs, the Form 396-A will no longer ask applicants to list certain categories of proposed recruitment sources in Section IV, but will instead allow applicants to propose the recruitment contacts that they believe will achieve wide

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[282] In *Suspension Order*, we suspended the requirement that applicants file this form. 13 FCC Rcd at 21998.

dissemination and be productive in generating qualified applicants whenever vacancies occur. Applicants will also be required to Ñidentify in Section V of Form 396-A whether they elect to utilize the supplemental recruitment measures or to use the alternative recruitment program, in accordance with the discussion above.

3. Cable EEO Program Requirements

a. Rules and Policies for EEO Program

179. Recruitment. In the *NPRM*, we noted that our cable EEO rules contain some of the same provisions that the court in Lutheran Church found unconstitutional and therefore proposed to modify these rules to avoid possible constitutional problems.[283] Specifically, we proposed to eliminate provisions in the cable EEO rules which may pressure or otherwise encourage cable entities to hire or maintain a staff that reflects the composition of the local labor force. In addition, we proposed new cable EEO rules, which, like the broadcast EEO Rule that we adopt today, emphasize broad and inclusive recruitment outreach. We sought comment on whether to adopt specific recruitment requirements for cable entities or to afford cable entities flexibility in crafting their recruitment programs.

180. Commenters support our proposal to modify the cable EEO rules consistent with the court's decision in *Lutheran Church*.[284] Accordingly, we modify our cable EEO rules as proposed in the *NPRM* to remove all requirements that cable entities compare their employment profile and employee turnover with the local labor force. In addition, the Commission will no longer compare individual cable units' employment

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[283] *NPRM*, 13 FCC Rcd at 23023-24 (para. 51).

[284] NCTA Comments at 3; Camrory Comments at 2-3; CRB Comments at 2; Ameritech New Media, Inc. (Ameritech) Comments at 1.

profiles with the local labor force, even as a screening device. We believe that these modifications will ensure that cable entities are not pressured or encouraged to adopt racial or other preferences in hiring. Consistent with these modifications, we also revise the annual employment reports (Forms 395-A and 395-M) and Supplemental Investigation Sheets ("SIS" or "SIS form") filed by cable employment units (defined in 47 C.F.R. § 76.71) as described below.

181. Regarding recruitment, commenters agree that broad and inclusive recruitment is necessary to ensure that all qualified applicants, including minorities and women, are informed of, and have an opportunity to compete on a level playing field for, job openings in the cable industry.[285] Commenters generally favor a flexible approach to recruitment for cable entities over one mandating the use of a minimum number of minority and female recruitment sources, whether or not tied to the size of the local minority labor force.[286] Commenters maintain that giving cable entities flexibility to fashion their own recruitment strategies will result in more individualized, and thus more effective, EEO programs.[287] While most of the specific, comprehensive recruitment proposals offered by commenters were geared toward broadcasters, one commenter recommends offering both broadcasters and cable entities a "menu" of options for

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[285] *See* NCTA Comments at 4-5; TCI Comments at 10-11; CRB Comments at 5; Camrory Comments at 3.

[286] NCTA Comments at 5-11; NCTA Reply Comments at 4-5; TCI Comments at 10-13; Small Cable Business Association (SCBA) Comments at 8 (organization representing 300 small cable businesses and systems); CRB Comments at 5-7; Camrory Comments at 3-4.

[287] NCTA Comments at 9-10; CRB Comments at 5.

recruitment.[288] Another commenter suggests conforming the cable EEO rules with the revised broadcast EEO Rule to the extent possible to eliminate confusion between the two sets of requirements.[289]

182. For the reasons set forth above with respect to broadcasters, we believe that broad and inclusive recruitment by cable entities is essential to deter discrimination and foster diversity of programming. We also believe that our objective of ensuring that minority and female applicants have the opportunity to apply for positions in the cable industry, underlying the recruitment requirement set forth in Section 634(d)(2)(B), can be achieved without requiring recruitment methods that are specifically targeted to those groups.[290] Broad outreach efforts should be effective to reach minorities and women, as well as other segments of the community that may previously have been deprived of the opportunity to compete for employment in the cable industry due to limited access to word-of-mouth recruitment networks. We conclude that adoption of a recruitment rule for cable entities similar to that adopted for broadcasters will afford cable entities flexibility to design outreach programs that best suit their individual circumstances and needs. We recognize, however, that some modifications to the rule are necessary to conform the rule to statutory requirements particular to cable. Accordingly, we adopt for cable entities a modified version of the broadcast recruitment rule, as described below. In addition, we revise the

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[288] NOW Comments at 24-27.

[289] Camrory Comments at 3.

[290] Section 634(d)(2)(B) provides that cable entities shall "use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever jobs are available in its operation." 47 U.S.C. § 554(d)(2)(B).

cable EEO rules, as well as the annual employment reports and SIS forms filed by cable employment units, to make it clear that cable entities are not required to target any particular recruitment sources. Cable entities are given wide discretion in designing their outreach programs provided they reach a broad cross-section of the community, including minorities and women, with information concerning job vacancies.

183. As in the case of broadcasters, we will afford cable entities the option of ensuring that their EEO programs are successful in achieving broad outreach through the use of one of two approaches: the use of the two supplemental recruitment measures as detailed in the discussion concerning the broadcast EEO Rule; or the use of the alternative recruitment program. The requirements we will apply to cable entities are similar to those applicable to broadcasters with one exception. Thus, while we are incorporating into our recruitment rule for cable entities a menu of options for supplemental recruitment measures similar to the menu we are adopting for broadcasters, which includes job fairs, intern programs, training programs, mentoring programs, and interaction with educational and community groups, instead of requiring cable employment units to implement four of these options every two years as with broadcasters, we will require cable employment units to implement two of these options each year. The two-year period for broadcasters coincides with the requirement to file the Statements of Compliance every two years. Cable employment units, on the other hand, are required by statute to file annual employment reports, which include a series of compliance questions. Rather than require cable employment units to file a separate Statement of Compliance every two years like broadcasters, we think it would be less burdensome to simply add a question regarding compliance with the new recruitment rule to the employment reports that cable employment units are required by statute to file annually. We modify the annual employment reports for cable employment units as described

below to add this requirement. Since cable employment units will be certifying compliance with the recruitment requirements on an annual basis, we think it is appropriate to modify the required number of menu options to fit the shorter implementation period.

184. Initially, we will require that cable entities file with the Commission and place in their public file a statement as to their election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach within forty-five days of the effective date of the new rules. This will ensure that both the Commission and the public are aware of the approach the broadcaster intends to implement. In order to facilitate the initial election, we are preparing a form to be utilized for the initial election. Any cable entity that does not receive a copy of the form by mail may obtain one from the Commission. Thereafter, cable entities may change their election annually at the time of the filing of their annual program reports (FCC Form 395-A or FCC Form 395-M). We will amend those forms to provide for the election. We are permitting cable entities to modify their election annually (instead of every two years, as in the case of broadcasters) because, as noted, cable EEO compliance is administered on an annual basis as required by statute. Copies of the initial election statements will be on file in the Commission's Public Reference Room. In the future, we intend to make information regarding an entity's election electronically available on our web site.

185. Our recruitment rule for cable entities will apply to all full-time positions, both upper-level and lower-level. One commenter argues that any recruitment requirements for cable entities should be limited to upper-level positions that directly influence programming diversity because the court in *Lutheran Church* specifically found that the Commission has no evidence

linking lower-level employees to programming diversity.[291] This commenter acknowledges that the *Lutheran Church* decision did not directly address the cable EEO rules, but asserts that the court's analysis of programming diversity as a justification for the broadcast EEO Rule applies equally to the cable EEO rules.[292] However, as discussed above, the Commission has express statutory authority under Section 634 of the Communications Act to adopt recruitment requirements and other EEO rules for cable entities. Moreover, Section 634(d)(2)(B) requires cable entities to recruit "whenever jobs are available,"[293] and Section 634(d)(3)(A) requires cable entities with five or more full-time employees to report both upper-level and lower-level employees on their annual employment reports.[294] The Commission, therefore, not only has statutory authority to apply recruitment requirements for cable entities to both upper-level and lower-level positions, but is required to do so.

186. For the reasons stated in our discussion of the broadcast recruitment requirements, we will apply the same policies on promotions, temporary employees, interns, part-time employees and former employees to cable entities as we are applying to broadcasters. Thus, we will not ordinarily require cable entities to recruit for internal promotions, temporary employees and interns. However, temporary employees and interns will be subject to recruitment requirements if they are later considered for permanent positions. With respect to part-time positions, we will include a provision in our cable rules clarifying that, in the

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[291] Ameritech Comments at 3-4.

[292] *Id.*

[293] *See* 47 U.S.C. § 554(d)(2)(B).

[294] *See* 47 U.S.C. § 554(d)(3)(A).

case of part-time hires, cable entities need only substantially comply with the requirement to recruit for every vacancy. For example, cable entities choosing that approach will not be required to provide notification to requesting organizations for part-time vacancies. We will also expect cable entities to conduct recruitment for hires involving former employees.

187. Analysis/Recordkeeping. In the *NPRM*, we proposed that cable entities retain certain records in order to meaningfully self-assess the effectiveness of their EEO programs and to prove that they have made good faith efforts to broaden their applicant pools for all vacancies. Among other things, we proposed to continue to require cable entities to maintain records as to the race, national origin and gender of all applicants generated by each recruitment source according to vacancy.[295] We nevertheless requested comment on whether extensive applicant pool records were necessary. While NCTA and TCI support retention of the requirement that cable entities maintain extensive applicant pool data,[296] other commenters complain that this recordkeeping requirement is time-consuming, burdensome and inherently unreliable because it relies primarily on voluntary self-identification by applicants of their race and national origin.[297]

188. As we explained in our discussion of the recordkeeping requirements for broadcasters, our purpose in establishing any recordkeeping requirement for cable entities is primarily to ensure that cable entities engage in meaningful outreach and to provide a basis upon which they and the Commission can

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[295] *NPRM*, 13 FCC Rcd at 23029-30 (para. 73).

[296] NCTA Comments at 13-14; TCI Comments at 15; NCTA Reply Comments at 6-7.

[297] Ameritech Comments at 7-8; CRB Comments at 11.

analyze their recruitment efforts. As in the case of broadcasters, we conclude that this goal can be achieved in many cases, without the necessity of maintaining applicant pool data. However, we will afford those cable entities that believe they can best ensure meaningful outreach through the use of the alternative recruitment program, rather than the use of the supplemental recruitment measures, the option to do so.

189. Accordingly, we will require that cable entities maintain the same records of their EEO recruitment efforts as broadcasters, which will differ in part based on whether the cable entity elects to employ supplemental recruitment measures or the alternative recruitment program.[298] Thus, we will require cable entities to retain in their own records documentation necessary to verify that recruitment occurred for each vacancy, including a list of the vacancies filled during the pertinent review period, the recruitment sources contacted for each vacancy and other recruitment efforts undertaken. In addition, we will require that cable entities maintain records of the recruitment source of their hirees and interviewees (in the case of those cable entities that elect to utilize supplemental recruitment measures) or maintain applicant pool data (in the case of cable entities that choose the alternative recruitment program). We will expect cable entities to use these records as a starting point in analyzing the success of their recruitment efforts in achieving broad outreach to all segments of the community and, in the event of problems in that respect, to make modifications in their recruitment efforts, as warranted. Thus, the rules we are adopting require a cable entity to analyze the effectiveness of its outreach program, and address any problems found.

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[298] *See* discussion of broadcast recordkeeping requirements, above.

190. We will require that cable entities maintain these recruitment records for a minimum of seven years.[299] As requested by one commenter,[300] we clarify that cable entities may maintain records of their EEO efforts electronically, e.g., by retaining electronic copies of e-mail notices of job openings to recruitment sources and scanning pertinent documents into a computer format. Permitting cable entities to maintain electronic records of their EEO efforts will reduce burdens on cable entities and will also reduce the likelihood that records could be lost, as computer records can be backed up. In this regard, we caution cable entities that, absent a showing of extraordinary circumstances, we will not credit claimed recruitment efforts that cannot be supported by records.

191. Public File. As with broadcasters, we believe that it is important that local community residents have a role in monitoring cable entities' compliance with our outreach requirements. In order to facilitate public participation in this process, we will require that each cable employment unit place in its public file annually, and post on its web site, if it has one, on the anniversary of the date that the employment unit's annual employment report is due to be filed, the following information: (1) a list of all full-time vacancies filled by the cable employment unit during the preceding year, identified by job title; (2) for each such vacancy, the recruitment source(s) utilized to fill the specific vacancy (including, in the case of cable entities utilizing the supplemental recruitment measures, organizations entitled to notification of vacancies, which should

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[299] Under Section 634(f)(1) of the Communications Act, if the Commission finds that a cable entity has failed to comply with the statutory EEO requirements three or more times during any seven-year period, such failure shall constitute a "substantial failure to comply" with Title VI of the Communications Act. 47 U.S.C. § 554(f)(1).

[300] Ameritech Comments at 9.

be separately identified), including the address, contact person, and telephone number of each source; and (3) a statement as to the cable entity's initial election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach and changes resulting from a substantial change of ownership (other changes in the entity's election will be in its annual employment reports, which already must be included in the public file). In addition, cable employment units which elect to utilize the supplemental recruitment measures will be required to include in their public file: (1) a list of the recruitment source that referred the hiree for each full-time vacancy; (2) data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and, for each recruitment source utilized in connection with any such vacancies, the total number of interviewees referred by that source; and (3) a list and brief description of the menu options engaged in during the preceding year. Those cable employment units which do not elect to utilize the supplemental recruitment measures will be required to include in their public file data reflecting, for each recruitment source utilized for any full-time vacancy during the preceding year, the total number of applicants generated by that source, the number of those applicants who were female, and the number of those applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated.

192. Relief for Qualifying Units. We will also insert a provision for cable employment units with six to ten full-time employees, similar to the provision that we are adopting for broadcast stations that are part of an employment unit with five to ten full-time employees, because we agree with SCBA that small staff cable employment units have limited

financial/administrative resources[301] and that there should be regulatory parity, to the extent possible, between the broadcast and cable industries.[302] The rule provision relating to qualifying cable employment units will state that they are required to choose only one option from the supplemental recruitment measures menu. Larger cable employment units will be required to choose two of these options. Qualifying cable employment units will be expected to meet all other EEO requirements, including, e.g., filing Forms 395-A and 395-M, and maintaining a copy of their EEO public file report in their public file. We will continue our current policy of not requiring cable employment units with fewer than six full-time employees to demonstrate compliance with the EEO program requirements. We emphasize, however, that all cable entities, including those with fewer than six full-time employees, are subject to the provision of the EEO rules that prohibits discrimination. Further, although we are not requiring cable employment units with fewer than six full-time employees to comply with specific recordkeeping and reporting requirements, these units continue to be required to maintain an EEO program, pursuant to Section 634 of the Communications Act. In accordance with our prior practice, we will consider employees to be full-time if their regular work schedule is 30 hours per week or more.

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[301] In its Reply Comments, NCTA maintains that, just like small staff stations, small staff cable employment units have limited financial, personnel and time resources available for recruiting and, just like small market stations, small market cable employment units may have difficulties competing with units in larger markets. Therefore, NCTA urges the Commission to recognize the need for flexibility regarding recruitment contacts and sources used by small cable employment units in small markets. NCTA Reply Comments at 5.

[302] SCBA Comments at 2-7. However, for the reasons already discussed, we do not agree that a total exemption from EEO program requirements, as proposed by SCBA, is necessary.

193. Other Matters Concerning Cable EEO Rules. In the *NPRM*, we proposed to require that a cable entity analyze its efforts to recruit, hire and promote in a nondiscriminatory fashion and address any difficulties in implementation of its EEO program.[303] We suggested that such analysis include review of union agreements, seniority practices, productivity of recruiting sources, employee pay and benefits, utilization of media for recruitment purposes, and selection techniques or tests. Commenters who address the issue support adoption of this requirement for cable entities.[304] We will adopt this requirement for the reasons set forth in the *NPRM*. Furthermore, because we have decided to ask for this information by means of a question in the SIS, as discussed below, we will not require that cable employment units submit a separate statement detailing their analysis every five years along with their SIS, as we suggested in the *NPRM*.

194. We proposed in the *NPRM* to retain the general EEO policy requirements for cable entities, which are outlined in Section 76.73 of the Commission's Rules.[305] We also proposed to retain the EEO program requirements for cable entities which are included in Sections 76.75(a), (d) and (e).[306] No commenters addressed these proposals. Accordingly, we will retain these general EEO policy and program requirements for cable entities.

195. Finally, we will include in our cable EEO rules language clarifying that the provisions in those rules are not

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[303] *NPRM*, 13 FCC Rcd at 23029 (para. 72).

[304] NCTA Comments at 12; TCI Comments at 13-14; CRB Comments at 7.

[305] *NPRM*, 13 FCC Rcd at 23024 (para. 54).

[306] *Id.* at 23024-25 (para. 55).

intended to require that any person be given preferential treatment based on race, color, national origin, religion, age, or gender.

196. Enforcement. As required by 47 U.S.C. § 554(d)(3)(A), cable employment units with six or more full-time employees will be required to file annual employment reports with the Commission. The Commission will use the recruitment-related information provided in the Forms 395-A or 395-M, but not the employment profile, to determine annually whether units are in compliance with the EEO rules, as required by 47 U.S.C. § 554(e)(1).[307] Data required to be included in the Forms 395-A and 395-M are described herein. We emphasize, however, that statistics provided about race, ethnicity, and gender of employees will not be used to determine compliance with EEO rules but will only be used to monitor industry trends and report to Congress. Systems found to be in compliance will receive a Certificate of Compliance. Systems found not to be in compliance will receive notice that they are not certified for a given year.

197. Normally, before notifying a unit that the Commission has found it noncompliant, the Commission will send an inquiry to the unit requesting in formation addressing the Commission's concerns. As part of an inquiry, the Commission may request information from the cable entity concerning its recruitment efforts. Also, annual employment reports should be based on recruitment efforts documented in items contained in a unit's own records. Consequently, a unit should retain any records necessary to document its recruitment efforts, including documentation of information provided in annual employment reports and supplemental investigation responses (described

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[307] We had also proposed in the *NPRM*, 13 FCC Rcd at 23030 (para. 74), that we continue to evaluate cable entities' EEO programs every year as part of the annual certification process.

below), even though the records will not be required to be placed in the public file or filed with the Commission on a regular basis. These records could include copies of letters notifying sources of job openings, copies of the unit's job listings in newspapers or on web sites, and, if applicable, copies of requests from sources that they be notified of openings and copies of notices sent to them, information verifying participation at job fairs, and other similar types of outreach information. In addition, the Commission's cable EEO public file rules, 47 C.F.R. §§ 76.79 and 76.1702, will be amended to require units, by the same date they are due to file their annual employment reports, to place in their public file a record of the items listed above.

198. As provided in 47 U.S.C. § 554 (f), a cable entity may be found to have committed a "substantial failure to comply" with the requirements of the Communications Act if a unit is found to have three or more failures in compliance in a seven-year period. Thus, units will be required to retain for a minimum of seven years any records necessary to document their recruitment efforts.

199. As noted above, we are required by statute to certify annually whether units are in compliance with our EEO rules. Thus, in order to verify compliance with the EEO rules and the accuracy of the recruitment-related information in Forms 395-A or 395-M, the Commission may send inquiries to cable entities, as mentioned above. The Commission may at random conduct an inquiry of a unit requesting information relating to the unit's compliance with the EEO rules. We may also conduct an inquiry if the Commission has evidence of a possible violation of the EEO rules. Initially, the inquiry may request documentation of recruitment-related information reported in the Forms 395-A or 395-M. Further inquiry or inquiries may be conducted requesting additional retained recruitment effort documentation that is not reported in the forms, such as the

information required to be included in a unit's public file and other data.

200. In addition to annual certifications, the Commission will investigate each cable and MVPD unit at least once every five years, as required by 47 U.S.C. § 554(e)(2). Units will be required to submit supplemental investigation information, as requested in the SIS form, with their regular 395-A or 395-M reports in the years they are investigated.[308] The requirements of the SIS form are described below. Supplemental investigation responses will be filed with annual employment reports when due, and thus will be required to be included in a unit's public file.

201. Most commenters support the continued use of such tools as the annual certifications and the supplemental investigations, as proposed herein.[309] TCI states that annual certifications, periodic inquiries, supplemental investigations every five years, and the possibility of a forfeiture for violations provide incentives to cable entities to evaluate their own programs annually, provides incentives for repeat violators to comply with rules, and serves as a deterrent to others.[310] We agree. Some commenters also suggest that the Commission base its evaluations of units' EEO programs on efforts and not

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[308] One commenter notes that the statute requires supplemental investigations to be conducted once every five years but suggests that the Commission recommend that Congress change the provision to once every eight years to bring cable more in line with reviews of broadcast EEO programs that take place at the time licensees file for license renewal. SCBA Comments at 5, n.10. This suggestion, however, is beyond the scope of this proceeding.

[309] *See* AWRT Comments at 9; NCTA Comments at 12; NCTA Reply Comments at 6; CRB Comments at 6, 8; TCI Comments at 8.

[310] TCI Comments at 9. *See also* NCTA Reply Comments at 8.

on results and that the Commission not use labor force comparisons.[311] We adopt these suggestions, as discussed above. The public may file complaints concerning the EEO programs of units, which might be based on annual employment reports, supplemental investigation information, or the contents of a unit's public file. Cable entities found to be in violation of the EEO rules may be subject to sanctions and remedies including noncertification, admonishment, reporting conditions, and forfeitures. The appropriate sanction or remedy will be determined on a case-by-case basis.

b. Forms

202. Pursuant to statute, the Commission requires cable employment units with six or more full-time employees to file an employment report (Form 395-A) annually, which calls for responses to questions about the entity's EEO efforts as well as employment, hiring, and promotion data.[312] The information requested on Forms 395-A and 395-M, including a series of compliance questions, is required by statute.[313] Specifically, the current forms require cable employment units to provide employment data for all employees, as well as information on employee promotions and job hires. In addition, cable employment units must provide a "yes" or "no" response to a series of compliance questions. In the *NPRM*, we proposed to modify our cable forms to the extent necessary to avoid constitutional problems. As stated previously, we believe that broad rulemaking authority granted to us in Section 634 of the

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[311] TCI Comments at 9, n. 11; NCTA Comments at 12.

[312] 47 U.S.C. § 554(d)(3); 47 C.F.R. § 76.77. Form 395-M, the Multi-Channel Video Program Distributor Annual Employment Report, is similar to the Form 395-A.

[313] 47 U.S.C. §§ 554(d)(2), (3)(A),(B).

Communications Act permits us to change both the cable EEO rules and the cable EEO forms to advance the congressional goals Identified in the statute, as well as to avoid constitutional problems.

203. After consideration of the comments on this issue, we have concluded that we should continue to require cable employment units with six or more full-time employees to provide annual employment profile data on all positions in order to continue our monitoring of industry trends and to report to Congress.[314] Thus, these cable employment units will be required to submit to the Commission annual employment profile data for all jobs on Forms 395-A and 395-M. However, these employee statistics will not be used to assess EEO compliance but will be used solely for the preparation of trend reports and to report to Congress. Further, we will continue to require cable entities, consistent with 47 U.S.C. § 554(d)(3)(B), to keep copies of Form 395-A and 395-M available for public inspection.

204. We have determined, however, that it is appropriate to eliminate or revise certain questions on Forms 395-A and 395-

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[314] While not challenging reinstatement of the reporting requirement on constitutional grounds, Ameritech argues that the Commission has statutory authority to regulate work place discrimination only to the extent that it affects programming, and that we should therefore modify the cable EEO reporting requirement to apply only to positions that can directly influence programming and program diversity. Ameritech Comments at 5. As discussed above, the Commission has *explicit* statutory authority to regulate the EEO practices of cable entities with respect to all job categories. *See* 47 U.S.C. § 554. Moreover, Section 634 of the Communications Act specifically requires cable entities with more than five full-time employees to file annual reports identifying the race, sex and job title of employees in 15 comprehensive categories. See 47 U.S.C. § 554(d)(3). Thus, the Commission not only has statutory authority to continue collecting employment information from cable entities with respect to all job categories, it is required to do so.

M in Section III. Specifically, we will eliminate question three because we conclude that it is not "possible"[315] for us to require cable entities to enforce an obligation that a court has found infringes constitutional rights.[316] For the same reason, we eliminate all form sections concerning available labor force and occupational availability data, employee promotions, and job hires. Therefore, we have eliminated Sections V.B., V.C., and VI of Forms 395-A and 395-M. We also eliminate employee promotion and job hires data in Section VII.

205. We also believe that it is appropriate to amend the questions on Forms 395-A and 395-M to reflect our new EEO program requirements. Thus, former question one (now question two) will be revised to require cable entities to answer whether they have "widely" disseminated their EEO programs.[317] In addition, we amend the instructions to former question two (now question three) to clarify that we require that a unit engage in broad and inclusive outreach.[318] Question four will be changed to emphasize that promotions are to be offered

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[315] *See* 47 U.S.C. § 554(d).

[316] Question three asked, "Do you evaluate your employment profile and job turnover against the availability of minorities and women in your franchise area?"

[317] Former question one asked, "Do you disseminate your EEO program to job applicants, employees, and those with whom you regularly do business?"

[318] Former question two and current question three asks, "Do you contact minority organizations, women's organizations, media, educational institutions, and other potential sources of minority and female applicants for referrals whenever job vacancies are available in your organization?"

to all persons in a nondiscriminatory manner.[319] Question five will be revised to make clear that any such efforts should be broad so as to include all segments of the community, and that no entity should be excluded on the basis of race, ethnicity or gender.[320] Further, question five will be amended to emphasize that efforts to seek out entrepreneurs shall be conducted in a nondiscriminatory manner. We also revise question six to ask whether cable employment units have analyzed the results of their EEO efforts in a nondiscriminatory manner.[321] The new Forms 395-A and 395-M will have a new question (question one, Section III) which will require cable employment units to answer whether they have complied with the outreach provisions in accordance with Section 76.75(b) or (f), as applicable, of the Commission's Rules. We believe that the rulemaking authority granted to us by Section 634, as discussed above, affords us sufficient latitude to make these changes. We will continue our current exemption for cable employment units with fewer than six full-time employees from filing employment and compliance data on the 395-A, 395-M, and SIS forms.

206. Cable employment units are subject to a more thorough review every five years with the SIS form, pursuant to statute.[322]

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[319] Formerly, question four read, "Do you undertake to offer promotions to positions of greater responsibility to minorities and women in a nondiscriminatory manner?"

[320] Formerly, question five asked, "To the extent possible, do you seek out minority and female entrepreneurs and encourage them to conduct business with all parts of your organization?"

[321] Formerly, question six asked, "Do you analyze the results of your efforts to recruit, hire, promote, and use the services of minorities and women and use these results to evaluate and improve your EEO program?"

[322] *See* 47 U.S.C. § 554(e)(2); 47 C.F.R. § 76.77.

The SIS requests information regarding specific recruitment efforts and job categories. The questions on the SIS reflect the compliance questions on the Forms 395-A and 395-M, but ask for narrative responses, instead of "yes" or "no" answers. Thus, consistent with the changes we stated above, we conclude that we may eliminate and revise the corresponding questions in Part 2 of the SIS. Specifically, we will delete question three from the SIS.[323] We also believe that it is appropriate to change former question one (now question two) to ask cable entities to describe their efforts to widely disseminate their EEO programs.[324] Also, we clarify that former question two (now question three) contemplates broad, inclusive outreach.[325] In addition, similar to the revisions to questions four, five, and six on Forms 395-A and 395-M, we amend questions four, five, and six on the SIS to clarify that we intend for such efforts to be conducted in a nondiscriminatory manner.[326] The SIS will also

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[323] Question three read, "Report the findings of the employment unit's evaluation of its employment profile and job turnover against the availability of minorities and women in the relevant labor force."

[324] Former question one asked, "Describe the employment unit's efforts to disseminate its equal employment opportunity program to job applicants, employees, and those with whom it regularly does business."

[325] Former question two and current question three read, "Name the minority organizations, organizations for women, media, educational institutions, and other recruitment sources used to attract minority and female applicants whenever job vacancies become available."

[326] Formerly, questions four, five, and six read as follows: "Explain the employment unit's efforts to promote minorities and women in a nondiscriminatory manner to positions of greater responsibility;" "Describe the employment unit's efforts to encourage minority and female entrepreneurs to conduct business with all parts of its operation and provide an analysis of the results of those efforts;" "Report the findings of the employment unit's analysis of its efforts to recruit, hire and promote minorities and females and explain any difficulties encountered in

have a new question (question one) which will require cable employment units to describe their efforts to comply with the outreach provisions of Section 76.75(b) or (f), as applicable, of the Commission's Rules. Finally, the SIS will require the submission of the information placed in the entity's public file for the preceding year.

207. Part I of the SIS requires cable employment units to provide brief descriptions of specified job categories.[327] We will change this section to remove the requirement that cable entities provide a breakdown of employees by gender and race, and job descriptions for minorities and females. The *NPRM* proposed to require cable entities to submit a statement detailing an analysis of their EEO programs for the preceding 12 months, and ask questions concerning what training or internship programs for minorities and/or women they have implemented on their Form 395-A or 395-M Supplemental Investigation Sheet. Upon further reflection, we have decided not to require cable employment units to file such statements. We believe that the information that cable entities are to submit to the Commission on Forms 395-A, 395-M, and the SIS will be sufficient to allow us to assess their EEO outreach efforts. Also, cable employment units which elect to employ the supplemental recruitment measures will not be required to

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implementing its EEO program."

[327] This section reads: "Give brief job descriptions for employees in the job categories specified below. The number specified in the box indicates the number of different job descriptions that are to be submitted for each category. If no female or minorities are employed in the specified job category, choose another job category and indicate this on the form. Job descriptions should include the position title and a brief description of the major duties and responsibilities of the individual(s) in the position. In addition, the number of individuals currently employed under the position title and a breakdown of these employees by sex and minority/national origin should be included."

submit information concerning the total number of applicants received from each listed source, or the total number of minority and female applicants received. We will, however, continue to require cable entities to report part-time, as well as full-time, employees on Forms 395-A and 395-M, as required by statute.[328]

208. Commenters favor the process currently used by the Commission, with an annual submission of Form 395-A or 395-M, and an SIS filed once every five years.[329] These commenters support the form changes proposed in the *NPRM* and state that the Commission should revise Form 395-A to reflect the Commission's cable EEO rule modifications. These commenters are opposed, however, to a revision to the forms that would request information concerning the total number of applicants received from each listed source or the total number of minority applicants received. As stated earlier, we do not believe that maintaining or reporting to the Commission applicant pool data is necessary if entities elect to employ the specific supplemental recruitment measures which we believe ensure the success of their outreach. Therefore, we will not require that cable entities that elect to employ the supplemental recruitment measures report such data in their cable EEO forms. However, such entities will be required to submit with their SIS response data concerning the recruitment source of hirees and interviewees for the preceding year that is required to be placed in the public file. Also, entities that elect not to employ the supplemental recruitment measures will be expected to submit with their SIS response data concerning applicant pools for the preceding year that is required to be placed in the public file.

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[328] *See* 47 U.S.C. § 554(d)(3)(A), (B).

[329] *See* CRB Comments at 12; TCI Comments at 16; NCTA Comments at 12.

209. One commenter urges the Commission to permit cable entities to file a Common Carrier Annual Employment Report" (FCC Form 395) or an EEO-1 in place of Form 395-A.[330] We will not adopt this proposal. Forms 395-A and 395-M collect job title information within 15 job categories and employment data for six upper-level job sub-categories, which are required by statute.[331] Neither the Form 395 nor the EEO-1 call for this information.

C. Constitutional Issues

210. In the *NPRM*, we sought comment on our view that the EEO outreach and reporting requirements proposed in the *NPRM* would be constitutional under the *Lutheran Church* decision and other precedent.[332] We reasoned that EEO requirements designed simply to ensure that minority and female job candidates, as well as the community at large, are informed of job openings and encouraged to apply do not raise equal protection concerns as long as they are inclusive, assuring that all job candidates have access to information about job openings without regard to their race or gender, impose no greater burdens on non-minority broadcasters or cable entities than minority broadcasters or cable entities; and do not require, pressure, or encourage employers to adopt racial preferences.[333]

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[330] Ameritech comments at 9-10.

[331] *See* 47 U.S.C. §§ 554(d)(3)(A), (B); Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Equal Employment Opportunities, 3 FCC Rcd 5389 (1993) (petitions for reconsideration pending).

[332] *NPRM*, 13 FCC Rcd at 23011-13 (paras. 18-23).

[333] *Id.*

211. Several cable entities and other organizations commenting on the proposals concur with our view that they do not raise equal protection concerns. They state that the proposed outreach rule would require no more than inclusive outreach efforts to all sectors of the labor force, and would not in any way pressure or encourage employers to prefer minorities or women in hiring. Therefore, they contend, the proposed rule would not infringe rights protected by the Equal Protection Clause and would not be subject to heightened scrutiny.[334] They note that the proposed rule lacks the feature that caused its predecessor to be subjected to strict scrutiny. Under the new rule, broadcasters and cable entities would not be required to compare the racial composition of their employment profile with the racial composition of the labor force in their communities, and the Commission would not make that comparison in processing renewal applications.[335] Thus, the new rules would not indirectly pressure employers to make race-based hiring decisions contrary to the *Lutheran Church* decision. In addition, under the new rule, employers would gain no procedural advantage by bringing their levels of women and minority employees up to certain levels.[336] Accordingly, these commenters argue that the new rule could not be viewed as

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[334] *See, e.g.*, UCC Comments at 5-7, Appendix; MMTC Comments at 55-86; Time Warner Cable (Time Warner) Comments at 2 (owner of cable systems).

[335] *See, e.g.*, UCC Comments at 5-6; MMTC Comments at 62, 74.

[336] The *Lutheran Church* panel concluded that the Commission's processing guidelines -- which made it unlikely that an employer's EEO program would be examined at renewal if women and minorities were employed at half the rate of their presence in the local labor force -- encouraged employers to favor women and minorities in hiring. *Lutheran Church* at 353-54. No such processing guideline would be used in enforcing the proposed rule.

pressuring employers to hire minorities or women.[337] Further, these parties find nothing objectionable in the compilation or reporting of information concerning the race, ethnicity or gender of an employer's staff to enable the Commission to monitor industry trends and report to Congress.[338]

212. In contrast, broadcast industry commenters and several other organizations point to a number of aspects of the proposed recruitment requirements that they claim will be subject to strict scrutiny.[339] First, some of the commenters claim that the proposed requirement that broadcasters and cable entities use minority and female specific recruitment sources, as well as general recruitment sources, utilizes a "racial classification" and is therefore subject to strict scrutiny under *Adarand* -- regardless of whether it adversely affects any person.[340] One

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[337] MMTC also argues that the proposed collection of data on the race and gender of applicants to assess the productivity of recruitment sources would not pressure employers to grant preferences in hiring because "there is no possible regulatory benefit or detriment available to a broadcaster by hiring or not hiring minorities or women." MMTC Reply Comments at 5.

[338] *See, e.g.*, TCI Comments at 15-16; UCC Comments at 16-18; MMTC Comments at 82.

[339] *See, e.g.*, NAB Comments at 25-29; 46 Named StBAs Comments at 10-14; Institute Comments at 2-6; Delta Radio, Inc. and 11 other broadcasters (Delta Radio) Comments at 7-10; Evening Post Comments at 12-16.

[340] Institute at 2-3; Delta Radio at 8-10; Pacific Legal Foundation (PLF) at 3 (non-profit corporation that engages in litigation in matters affecting the public interest); VAB/NCAB Comments at 3-5; Roger Clegg Comments, Attachment (Vice-President and General Manager of the Center for Equal Opportunity); 46 Named StBAs Reply Comments at 7-8. One commenter makes an attempt to identify how qualified candidates might be disadvantaged by a minority-specific recruitment requirement. Institute asserts that such a requirement would disadvantage non-minorities because broadcasters have finite advertising budgets. Thus, it argues, a requirement

commenter claims that "by encouraging the recruitment of specific classifications of applicants, the Commission implicitly would be encouraging preferential hiring of those groups."[341]

213. Second, some commenters argue that the proposed requirement that broadcasters and cable entities monitor the productivity of their chosen recruitment sources by maintaining records of the race, ethnicity, and gender of applicants generated by each source, and change recruiting sources that prove unproductive, would be subject to strict scrutiny.[342] Forty-six Named StBAs, for example, assert that this requirement would require race-based decision-making and would pressure stations to make hiring decisions on the basis of race.[343] NAB similarly finds the proposed requirement for stations to assess the productivity of their recruitment sources to "instill improper pressures," though it does not specify what

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that a broadcaster run an advertisement in a minority publication will "inevitably mean that in some instances, a broadcaster will not run an advertisement in a non-minority publication," and that some non-minorities will thus fail to learn about the opening. Institute Comments at 4. See also Roger Clegg Comments, Attachment ("A recruitment policy that is aimed at increasing applications from some groups and not others -- as the FCC would require -- is discriminatory.").

[341] CRB Comments at 11 (law firm representing various cable operators).

[342] *See, e.g.*, NAB Comments at 25-27; 46 Named StBAs Comments at 10-11; VAB/NCAB Comments at 12-13; TAB Comments at 4-5; Golden Orange Broadcasting Company (Golden Orange) Comments at 2 (owner of a California television station); Evening Post Comments at 13-14; CRB Comments at 11; Curators Comments at 7-8; Institute Comments at 2-6; ACLJ Comments at 2-3; 46 Named StBAs Reply Comments at 9-10.

[343] 46 Named StBAs Comments at 10; 46 Named StBAs Reply Comments at 9-10.

stations will be "pressured" to do that is "improper."[344] Institute complains that the applicant monitoring requirement replaces "an unconstitutional system of proportional hiring with an equally flawed system of proportional recruiting."[345] It charges that the "true aim" of the policy is to ensure "proportional numbers of minorities are in the applicant pool rather than assuring that job vacancies are advertised in a nondiscriminatory manner."[346]

214. Third, some commenters assert that reinstatement of the requirement that broadcasters file the annual employment report on Form 395-B "threatens to improperly force stations to consider race or gender when hiring."[347] For example, while acknowledging that the Commission stated that it will use the data submitted in these reports only to monitor industry trends, NAB "opposes reinstatement of this reporting requirement because the Commission has not guaranteed that the Commission or others will not use the collected information

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[344] NAB Comments at 25-27. See also Curators Comments at 7 (targeted recruitment coupled with requirement for analysis of productivity of sources would "pressure stations to make race-conscious hiring decisions"); Golden Orange Comments at 2. Golden Orange argues that any self-assessment requirement that focuses on the results of the outreach program, rather that the employer's outreach efforts, would create the "pressure" that the court found offensive in *Lutheran Church*.

[345] Institute Comments at 5.

[346] *Id.*

[347] NAB Comments at 28. *See also* 46 Named StBAs Comments at 11-12; 46 Named StBAs Reply Comments at 11-12

against an individual broadcaster in case the 'numbers' look low."[348]

215. Fourth, a few commenters assert that proposed regulations requiring that broadcasters and cable entities exercise care to ensure that their selection techniques and tests, seniority practices, promotional practices, fringe benefit policies and dealings with labor unions do not have the effect of discriminating against qualified minorities or women raise equal protection concerns. They argue that these provisions are subject to strict scrutiny because they increase stations' and cable entities' race consciousness and pressure them to make race-conscious employment decisions.[349] Regarding the proposed requirement that employers refrain from discriminating in making hiring and promotion decisions, one commenter asserts that the "FCC makes plain that stations are expected to recruit, hire, and promote minorities and women, even if they do not have the qualifications or pass the tests required of other personnel."[350]

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[348] NAB Comments at 28. *See also* 46 Named StBAs Comments at 11-12;- NAB Reply Comments at 11.

[349] 46 Named StBAs Comments at 12; Curators comments at 7-8; PLF Comments at 3-4; Roger Clegg Comments (Attachment). PLF and 46 Named StBAs argue that the requirement to avoid the use of selection techniques and tests that have the effect of discriminating against minorities and women is more stringent than the parallel Title VII requirement; the latter, they argue, permits employers to use tests that the employer demonstrates are job related even if they have a disparate impact on minorities and women. *See* 46 Named StBAs Comments at 12-13; PLF Comments at 4. As discussed below, the Commission requirement was never intended to be more stringent than the parallel Title VII requirement, and, in fact, the Commission will apply its requirement in a less stringent manner than the Title VII requirement. Thus, the 46 Named StBAs and PLF have no cause for complaint in this regard.

[350] PLF Comments at 4.

216. Finally, the commenters who claim that our proposed rules would be subject to strict scrutiny under the Equal Protection Clause generally also assert that they are unlikely to withstand such scrutiny because they are not narrowly tailored to serve a compelling governmental interest.[351]

217. Since the new EEO program requirements we adopt today impose several distinct obligations, we will address the constitutionality of each. The basic recruitment obligation we impose gives broadcasters and cable entities discretion to recruit from whatever sources they choose as long as they widely disseminate information concerning job vacancies so that all qualified persons, including minorities and women, have an equal opportunity to apply for the position. Thus, this basic recruitment obligation requires fair and active outreach to all qualified persons, as many commenters advocate.[352] The courts have consistently held that recruitment measures that are designed to expand the applicant pool, and that do not favor anyone in the applicant pool on the basis of race, are race-neutral and are not subject to strict scrutiny.[353] No commenter

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[351] *See, e.g.*, Evening Post Comments at 16-20; S&B Comments at 15-22; Institute Comments at 6-8.

[352] *See, e.g.*, VAB/NCAB Comments at 7-8; CRB Comments at 11. CRB, representing cable companies, urges that "rather than require certain outreach thresholds or targets for particular classes, the Commission simply should require nondiscriminatory and aggressive outreach to all segments of the population." CRB Comments at 11. Similarly, VAB/NCAB, representing broadcasters, does not oppose the imposition of recruitment requirements, but urges the Commission to adopt EEO requirements that "focus on whether a broadcaster is acting in a fair and nondiscriminatory manner and has taken reasonable steps to provide employment opportunities to all qualified persons." VAB/NCAB Comments at 7-8.

[353] *See Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998) (curtailment of statutory preference to reside in redeveloped housing granted to former residents of

has cited any case, and we are not aware of any case, that has ever held inclusive outreach requirements to be constitutionally suspect, much less unconstitutional. Indeed, the court in *Lutheran Church* held that "if the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated."[354] The basic outreach requirement we adopt today does just that, and thus raises no equal protection concerns.

218. While we have decided, for policy reasons, not to require broadcasters to use recruitment sources specifically targeting minority and female job applicants, we disagree with those commenters who argue that a targeted recruitment requirement would be constitutionally suspect. As long as recruitment requirements are inclusive and do not afford any group superior access to information about job vacancies or pressure employers to make employment decisions on the basis of race or gender, we do not believe that they would raise

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area, most of whom were white, in order to make some of apartments available to all applicants regardless of race was not subject to strict scrutiny); *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997) (affirmative efforts to recruit women did not constitute reverse discrimination or support a finding that employer's reasons for hiring a woman were pretexts); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994) (both voluntary and consent decree provisions requiring recruitment of Black and women employees viewed by court as race neutral measures); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (*Peightal*) (affirmative action plan for county fire fighters designed to remedy past discrimination held narrowly tailored, in part, because fire department had tried "race-neutral" measures such as recruitment outreach to minorities and women in an attempt to diversify its applicant pool, with only limited success); *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535, 1553 (M.D. AL 1995) ("*Shuford*") (outreach requirements are not subject to strict scrutiny because they only expand the pool of qualified applicants).

[354] *Lutheran Church*, 141 F.3d at 351.

constitutional concerns.[355] Nevertheless, we have decided, as discussed above, to afford broadcasters considerable discretion in selecting the recruitment sources that will disseminate vacancy information most effectively to everyone in their communities, including minorities and women, rather than dictating the number or type of sources that all broadcasters must use. Thus, the constitutional objections raised by some commenters to targeted recruitment requirements are moot at the present time. As discussed above, we intend to monitor the effectiveness of the new rules to determine if different requirements are in order.

219. In addition to the wide dissemination requirement, broadcasters and cable entities will be required to undertake two kinds of supplemental recruitment measures: (1) sending notices of job vacancies to any recruitment organization that requests such notice, and (2) conducting supplemental recruitment initiatives selected from a menu of options, such as periodic participation in job fairs and internship programs. Under the first supplemental requirement, any national or local community organization that distributes information about employment opportunities to job seekers or refers job seekers to employers will be entitled to request notice of openings without regard to the organization's affiliation with members of any racial, ethnic, or gender group. Thus, this requirement will not favor any group based on a suspect classification, and will not require employers to take any action based on a suspect classification. It will simply ensure that if, despite the

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[355] *See Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994) (consent decree provisions requiring strengthened recruitment of Blacks and women viewed favorably by court); *Peightal*, 26 F.3d at 1557-58 (affirmative action plan for county firefighters was held to be narrowly tailored, in part, because fire department had previously tried "race-neutral" measures such as recruitment outreach to minorities and women in an attempt to diversify applicant pool, with only limited success).

employer's good faith efforts to widely disseminate information concerning job vacancies, any group believes its constituents are not adequately being reached or simply wants to assist in disseminating the information, it can do so. Similarly, the supplemental measures selected from the menu do not require employers to take any action based on race, ethnicity or gender, and do not favor or disadvantage any job applicant based on his or her race, ethnicity or gender. They are simply designed to supplement employers' vacancy-specific recruitment actions with longer term recruitment and training activities that will raise the level of community awareness of opportunities in the broadcasting and cable industries and develop a talent pool for companies to draw from as future vacancies occur.

220. Further, the records that broadcasters and cable entities will be required to keep, place in their public files, or file with the Commission to document compliance with their basic and supplemental recruitment obligations are race neutral. They are designed to provide a means to verify that broadcasters and cable entities have widely disseminated information concerning their vacancies and notified requesting organizations before filling those vacancies. The information is also designed to verify that broadcasters and cable entities have considered in good faith the applicants who respond to their outreach efforts. Thus, the requirements of the rules that broadcasters and cable entities recruit for all vacancies encompasses an obligation to consider the applications received as part of the hiring process.

221. Many broadcasters and cable entities who filed comments in this proceeding have asked for complete discretion regarding how to conduct their outreach programs to suit their own needs and communities. We have decided to give them the option of designing their own outreach programs, subject only to the requirements that they widely disseminate information concerning job openings (which they can do through any channels they desire) and monitor the composition of their

applicant pools so that they can determine whether their outreach efforts have in fact been successful in permeating their community. Several commenters argue that requiring employers to maintain records of the race, ethnicity and gender of job applicants generated by their recruitment sources and change sources if their recruitment sources prove unproductive or their efforts fail to reach the entire community would be constitutionally suspect. They claim that such requirements would pressure stations to make hiring decisions on the basis of race or otherwise "instill improper pressures."[356] Forty-six Named StBAs assert that analyzing the representativeness of applicant pools "will effectively create a quota system for hiring."[357] None of these commenters explains, however, how monitoring the race, ethnicity or gender of applicants will pressure employers to prefer anyone who applies for a job on the basis of race or gender or take any other action that could be prejudicial to any job applicant, and we do not believe it will. Indeed, in enforcing the recruitment requirements, the Commission will not even know the race, ethnicity or gender of the persons hired from the applicant pools. Thus, the regulatory scheme will not pressure employers to favor any applicant on the basis of his or her race, ethnicity or gender because granting a preference based on those factors will not improve the employer's posture under that scheme or make its EEO practices less likely to be scrutinized by the agency.

222. Nor is there any merit in the argument that we are instituting an unconstitutional system of "proportional recruiting."[358] The sole purpose of the applicant pool data is to

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[356] *See* NAB Comments at 25-27; 46 Named StBAs Comments at 9-10.

[357] 46 Named StBAs Comments at 9-10.

[358] Institute Comments at 5. *See also* 46 Named StBAs Comments at 9, asserting that the "fatal flaw" in the proposed regulatory scheme is the

assist employers and the agency in evaluating whether employer outreach efforts are inclusive. We have made it clear that there is no requirement of applicant pool "proportionality" to the composition of the local work force, not could there be, since employers cannot control who applies for a position. Nevertheless, we believe that monitoring the composition of its applicant pools will give an employer some useful information about whether its outreach efforts are missing a significant sector of the community, such that it should modify its recruitment measures to be more inclusive. For example, if an employer's outreach efforts fail to attract any Hispanic applicants in a metropolitan area with a large Hispanic population, it may decide that the recruitment sources it is using are not disseminating its job advertisements as widely as it thought, and it should take action to rectify the situation. Such action might consist, for example, in advertising its openings in a newspaper of wider circulation or perhaps in a Spanish-language newspaper. We do not see how any job applicant would be prejudiced by either the collection of the information or the subsequent broadening of outreach efforts. As the court observed in *Shuford*,[359] no job applicant can rightly complain about being forced to compete with a larger field of qualified candidates.

223. The cable entities who support the collection of data concerning the race and gender of applicants recognize that there is a difference between reaching out widely in recruiting and making discriminatory hiring decisions.[360] Our new rule requires broad outreach, and we believe that employers trying to reach out in good faith to all parts of their communities may

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"requirement that hiring pools be proportional to the minority population."

[359] 897 F. Supp. at 1552-53.

[360] *See, e.g.*, TCI Comments at 14-16; NCTA Comments at 13-14.

find it helpful to collect data to monitor the effectiveness of their efforts. But the collection of statistics to test whether broad outreach has been effective in no way requires or fosters hiring discrimination, which is unlawful under the Commission's rules and Title VII.[361]

224. In addition, we note that the alternative recruitment program is completely optional; any employer who prefers not to collect data concerning the race, ethnicity or gender of its applicants can comply with the basic and supplemental recruitment requirements fashioned by the Commission, none of which require the collection of such data. No broadcaster or cable entity has cause to complain about a program with which it is not required to comply.

225. We also do not believe that there is any substance to the argument that reinstatement of the Form 395-B filing requirement implicates equal protection concerns because it will force or pressure broadcasters to consider race, ethnicity or gender in making hiring decisions. We stated in the *NPRM* and repeat in this *Report and Order* that we will require the filing of that data only for the purposes of monitoring industry trends and reporting to Congress. We also state in the clearest possible terms that we will not use the data to assess broadcasters' or cable entities compliance with our EEO rules.

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[361] Moreover, the fact that in some circumstances statistical evidence relating to the employment of minorities and women is relevant does not render a nondiscrimination or outreach requirement constitutionally suspect. Statistical evidence plays a key role in determining compliance with Title VII and other statutes barring employment discrimination, but those statutes plainly are not unconstitutional. *See* B. Lindemann and P. Grossman, *Employment Discrimination Law*, 34-45 (statistics in disparate treatment cases), 89-106 (statistics in adverse impact cases), 1687-1740 (statistical proof generally).

226. Thus, contrary to NAB's contention, we have guaranteed that we will not use the Form 395-B information against any broadcaster in enforcing our EEO rules. Moreover, having stated that we will not use the employment profile data collected on Form 395 to assess compliance with our EEO rules, we will be legally foreclosed from doing so.[362] Therefore, no broadcaster or cable entity has reasonable cause for concern that the Form 395 employment profile data will be used against it in FCC enforcement actions. The fact that a few commenters suggest, without any factual foundation, that an agency has a concealed motive, cannot thereby deprive the agency of authority to adopt requirements that are clearly within its statutory authority. Of course, we cannot guarantee that no third party will file a petition against a broadcaster based on the Form 395-B employment profile data -- or some other equally inadequate basis, for that matter. But we will dismiss any such petition summarily.

227. Finally, a few commenters complain that even those provisions of the Commission's proposed rules that would merely require broadcasters and cable entities to take steps to assure that their policies and procedures for hiring and promoting employees do not discriminate against any person on the basis of race, ethnicity, or gender are constitutionally suspect because they "would collectively add to the pressure on stations to take race-based employment actions ...."[363] These

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[362] *See, e.g., Service v. Dulles*, 354 U.S. 363, 388-89 (1957) (Department of State was legally obligated to comply with its own regulations governing discharge of employees, notwithstanding more permissive statutory provisions); *Gardner v. FCC*, 530 F.2d 1086, 1089-91 (D.C. Cir. 1976) (an agency is bound by its own rules and established procedures). Of course, we are also foreclosed by the *Lutheran Church* decision from using the Form 395-B employment profile data to assess compliance with our EEO rules.

[363] 46 StBAs Comments at 13. See also PLF Comments at 3-5.

commenters appear to be arguing that even a race-neutral measure that is designed to *prevent racial discrimination* is subject to strict scrutiny because it is "race conscious."[364] Under this reasoning, Title VII and all other laws banning discrimination would be subject to strict scrutiny. The only authority cited for this novel proposition is *Lutheran Church*, but nothing in that decision supports it. As noted above, the court stated in *Lutheran Church* that race-neutral outreach or nondiscrimination requirements would raise no constitutional concerns.[365] We do not believe that rules requiring only nondiscriminatory employment decisions could reasonably be viewed as pressuring employers to "take race-based employment actions ..."[366] Indeed, the Supreme Court plurality explained in *City of Richmond v. J.A. Croson*,[367] that a government entity is free to employ a "whole array of race-neutral devices" to ensure that individuals or businesses provide equal opportunities to minorities and do not discriminate against them:

> Many of the formal barriers to new entrants ... may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would

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[364] PLF contends that, by requiring that broadcasters promote employees in a nondiscriminatory fashion and avoid the use of selection techniques and tests that have the effect of discriminating against minorities, the FCC expects stations "to recruit, hire, and promote minorities and women, even if they do not have the qualifications or pass the tests required of other personnel." PLF Comments at 4. Neither the cited rules nor anything the Commission has said can reasonably be interpreted in the manner suggested by PLF.

[365] *See Lutheran Church*, 141 F.3d at 351.

[366] 46 Named StBAs Comments at 13.

[367] 488 U.S. 469 (1989).

> have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. *Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.*[368]

228. Thus, we are confident that we can take steps to ensure that minorities and women are not either intentionally or "unthinkingly" denied a equal opportunity to compete for jobs in the broadcast and cable industries without treading on rights guaranteed by the Equal Protection Clause. Indeed, nondiscrimination and inclusive outreach requirements like those we adopt today advance the principle that is at the heart of the Equal Protection Clause: equal protection of the laws and equal opportunity for all citizens, regardless of race or gender. It turns equal protection analysis on its head to suggest that they are suspect under it.

V. CONCLUSION

229. In this *Report and Order*, we establish a new broadcast EEO Rule and policies and amend our cable EEO rules and policies. We believe that the rules and policies adopted herein are consistent with the court's decision in *Lutheran Church*, while at the same time ensuring equal employment opportunity in the broadcast and cable industries through vigorous outreach and prevention of discrimination. We acknowledge that some commenters urged us to adopt remedial rules, or, alternatively, initiate a national employment disparity study, pursuant to *City of Richmond v. Croson* and *Adarand Constructors v. Pena*, to gather a record sufficient to sustain a remedial approach. We

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[368] *Id.* at 510 (emphasis added).

will not pursue either of these alternatives at this time, but will keep MM Docket No. 98-204 open to allow any interested party to submit whatever information it deems germane to these issues and proposals. We will consider any submissions and determine what, if any, action is appropriate at a later date.

VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

230. *Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *NPRM*. The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the NPRM, including comments on the IRFA. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, a Final Regulatory Flexibility Analysis ("FRFA") is contained in Appendix B.

231. *Paperwork Reduction Act of 1995 Analysis*. The actions herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to, and become effective upon, approval by the Office of Management and Budget as prescribed by the Act. One commenter submits that the FCC's proposed collection of information from broadcasters and cable entities is not necessary for the legitimate functions of the Commission, that it therefore does not have practical utility, and that the administrative burden should be reduced by not collecting it.[369] We disagree. As stated in the *NPRM*, the court in *Lutheran Church* did not abrogate the Commission's authority to require broadcasters and cable entities to file

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[369] Oxley/Hall Comments at 2-3.

employment data in order to enable the Commission to analyze industry trends or prepare annual trend reports.[370] Furthermore, statutory provisions require the Commission to collect employment data for television and cable industries.[371] As we further stated in the *NPRM* and this *Report and Order*, knowledge of industry trends enables the Commission to monitor the effectiveness of, and need for, EEO rules and make appropriate recommendations to Congress for legislative change.

232. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554, this *Report and Order* IS ADOPTED, and Part 0, Part 73 and Part 76 of the Commission's Rules ARE AMENDED as set forth in attached Appendix C. It is our intention in adopting these rule changes that, if any provision of the rules, or the application thereof to any person or circumstance, are held to be unlawful, the remaining portions of the rules not deemed unlawful, and the application of such rules to other persons or circumstances, shall remain in effect to the fullest extent permitted by law.

233. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the American Center for Law and Justice IS DISMISSED.

234. IT IS FURTHER ORDERED that the late-filed comments and reply comments in this proceeding are considered as part of the record in this proceeding.

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[370] *NPRM*, 13 FCC Rcd at 23023 (para. 49).

[371] *Id.*

235. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix C WILL BECOME EFFECTIVE either 60 days after their publication in the Federal Register or upon receipt by Congress of a report in compliance with the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, whichever is later, and the information collection contained in these rules will become effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

236. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

237. IT IS FURTHER ORDERED that MM Docket No. 96-16 is terminated.

238. IT IS FURTHER ORDERED that the present phase of MM Docket No. 98-204 is terminated. However, MM Docket No. 98-204 will remain open for the limited purpose described in paragraph 229 and to facilitate any additional proceedings upon further order of the Commission. This action does not affect the effective date of the EEO Rules adopted herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

CONCUR BY: KENNARD; NESS; POWELL; TRISTANI (In Part)

CONCUR:

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

Re: Equal Employment Opportunity Rules and Policies (MM Docket Nos. 98-204, 96-16)

Today we adopt EEO rules for the twenty-first century.

It is very appropriate that we adopt these rules in a week that we began by honoring the life and legacy of Dr. Martin Luther King, Jr.

These rules help further Dr. King's dream of a colorblind society. While many of us share this dream, we are not there yet. If we were there, we would not be having a national dialogue about the virtual absence of minorities in prime time television. The dream will not be realized until women and minorities have an equal opportunity both in front of the camera and behind it, as well as in boardrooms and executive suites.

This order advances the twin goals of prohibiting discrimination in hiring and promoting diversity on the public's airwaves.

The only good approach to discrimination is zero tolerance. I know many broadcasters and cable operators share this approach. I commend them for their efforts and thank them for their support.

But I think it is no mere coincidence that the adoption of EEO rules in 1969 was followed by a steady and very substantial increase among broadcasters in the percentage of upperlevel jobs held by minorities and women. The EEO rules before us will continue the Commission's proud tradition of ensuring that broadcasters reach out to all segments of their community when it comes to seeking new hires.

These rules also reaffirm the Commission's long-standing obligation and commitment to ensuring that the public airwaves

reflect the diversity of the public itself. The goals of diversity and non-discrimination must be pursued in front of the TV camera as well as behind it.

These rules reflect a common sense manner of pursuing these important goals. These rules also are carefully crafted to follow the letter and the spirit of the court's opinion in the Lutheran Church case.

Broadcasters and cable entities are thus given substantial flexibility to mold an outreach program that fits their individual circumstances and communities. What works in one community might not be effective in another.

But in all communities the outreach must be real, it must be effective, and it must serve the public by being all-inclusive.

I know that there are many who wanted us to go further, or to conduct studies to document the current status of minority hiring and diversity on the air and take any appropriate remedial action.

These parties should note that we are keeping the docket in this proceeding open, so that any relevant studies and information can be filed with us and called to our attention in a specific docketed proceeding.

And while I am pleased that we are moving ahead, I had hoped we could do more.

For example, under the order as proposed, broadcasters who elect Option B must track race and gender data of their applicants, but not of those who actually interview for the job. Simply tracking who applies for a job only gives you part of the picture, because it does not show whether the outreach program is producing qualified applicants from all segments of the community. Obviously it is up to the broadcaster to determine who is qualified, but it is only after the applicant pool is

whittled down to a qualified applicant pool can the effectiveness of the outreach be determined.

In this respect, we should have gone further.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: Equal Employment Opportunity Rules and Policies (MM Docket Nos. 98-204, 96-16)

We make clear today that discrimination based on race, ethnicity or gender is antithetical to operating a broadcast station, cable system, or other multichannel video programming distribution system in the public interest. I have always advocated equal opportunity and believe that such efforts are critical if women and minorities are to be able to seek and obtain employment, training, promotion -- and ownership -- in the mass media and telecommunications industries. The rules we adopt today further this important goal without affecting the ability of broadcasters, cable systems, and other programming providers to hire the most qualified people.

While I disagree with the Court's assessment in Lutheran Church that our previous rules violated Constitutional standards, I accept its ruling. I believe that the rules we adopt today respond to the letter and spirit of the Court's opinion.

Significantly, the rules afford licensees flexibility to tailor their outreach programs to the needs of the marketplace. We do not impose a one-size-fits-all regulatory regime but rather allow licensees to select from a long list of supplementary recruitment methods or, if they so choose, to devise their own outreach program. Many broadcasters, for example, have developed creative ways to reach out to minorities and women in their communities and I believe such efforts should be encouraged.

Outreach efforts should be effective, not symbolic. To this end, I do not want licensees to use token gestures in meeting our requirement to "widely disseminate" job listings. Rather, licensees should deploy a variety of methods, including

postings on the Internet, advertisements in newspapers, and other notices in their effort to widely circulate information about job openings. Licensees should not rely on only one vehicle for disseminating job vacancy information to the population but should structure their efforts to maximize outreach throughout the community.

I strongly encourage broadcast associations to develop and publicize Internet-based job banks to aggregate and make available as many listings as possible. Such job banks eventually will facilitate a job search, not only in local communities but throughout any given state and, ultimately, throughout the Nation. Before such a tool can be effective, however, we must have a way of ensuring that listings are readily accessible to those who cannot afford a home computer with an Internet connection. Otherwise, our efforts to increase outreach may have the unintended consequence of reinforcing the digital divide.

Finally, I applaud the voluntary efforts by broadcasters and the cable industry to devise training programs that will enhance prospects for women and minorities to gain employment, rise to senior management posts, and position themselves for future ownership opportunities. Our EEO requirements should not represent the upper limit in this area, and voluntary efforts by employers are critical to achieving true workplace diversity.

STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: *Report and Order* - In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (MM Docket 98-204)

The public benefits of individuals in our society having equal employment opportunities, based on merit rather than discriminatory factors, are so numerous they are impossible to list. I believe few would disagree with this proposition. What is difficult is crafting initiatives designed to foster these Idcals that do not run afoul of the Constitution's command that such programs be sufficiently justified and that the means chosen be carefully fitted to the stated purpose. Recognizing that EEO programs crafted to assist one class of persons can accrue to the detriment of another, the judiciary has increasingly demanded stronger justification for such programs. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

Many have bemoaned these developments in equal opportunity jurisprudence. In many ways, however, I think that these developments on balance have been positive. More demanding judicial scrutiny forces those of us who believe in the goals of opportunity and non-discrimination to be more cautious in establishing programs and to be more thoughtful and rigorous in articulating justifying rationales. The decision in *Lutheran Church*[1] forced the Commission to challenge many of its assumptions and to try to craft an EEO program for which

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[1] See *Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344, *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*").

the purpose and mechanics rest on more solid footing. It has been a valuable exercise. I think we have largely succeeded in this Order for a number of reasons.

First and foremost, we introduce a program that is squarely race and gender neutral and, thus, not constitutionally suspect. At bottom, the adopted EEO rules are merely imperatives to reach out widely in recruiting for employment vacancies. All working Americans, regardless of stripe, benefit from such a program. Moreover, I am comfortable that nothing in this program fairly can be said to coerce or oblige broadcasters to hire any number of minorities or women, which was a central concern with our prior rules to the *Lutheran Church* court. *Cf. Lutheran Church*, 141 F.3d at 351-55.

Second, these EEO rules are limited and permissible measures that facilitate the avoidance of unlawful discrimination. They do not serve in any way to coerce broadcasters to hire any person of a particular race or gender. Requiring stations to recruit broadly is designed to serve as a curb against unintentional discrimination that "could not conceivably be understood as 'obliging' or 'encouraging' the use of any preference. It simply advises a method for increasing vigilance against discrimination" *Lutheran Church*, 154 F.3d at 497 (Edwards, C.J., dissenting) (on suggestion for rehearing *en banc*).

My own support for this item rests most heavily on its anti-discrimination rationale -- a basis the Commission did not proffer to the court in defense of its prior rules. I fully recognize that the Lutheran Church court cautioned that agencies are not free to police general societal discrimination and that any anti-discrimination rationale the FCC might offer would have to be tied to communications service. *Lutheran Church*, 141 F.3d at 355 ("Thus the FCC can probably only regulate discrimination that affects 'communication service' -- here, that means programming.") I believe that the present rules, designed as

curbs against discrimination, do relate to communications purposes, though not necessarily diversity of programming, as the court assumed. *Id.*

We are charged with the very unique responsibility of licensing the use of the airwaves. Such a license does not convey a property interest. *See FCC v. Nextwave Personal Communications, Inc.*, --- F.3d ---, 1999 WL 1267039 at * 5 (2nd Cir. Dec. 22, 1999). Instead, precedent holds that the licensee acts as a public trustee promising to operate in the "public interest." The concept is amorphous and heated debate over its parameters have long raged. I, myself, have frequently criticized its seemingly unbounded reach.[2] Yet, whatever the standard means, or what weight it can bear, it remains the law that failure to operate in the "public interest" can disqualify a licensee from holding a license. *See, e.g.*, 47 U.S.C. 309(a). As long as the public interest includes some component of worthiness to hold the public trust in the form of a license, it seems absolutely appropriate to condemn discrimination in our licensing policies. *See* 47 U.S.C. § 308(b).

Moreover, I find nothing in the Constitution that bars the Commission from adopting race and gender neutral outreach measures in order to curb or retard the possibility of discriminatory impacts.[3] Indeed, licensees are given

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[2] *See Willful Denial and First Amendment Jurisprudence*, Commissioner Michael K. Powell, Speech before the Media Institute, Washington, D.C. April 22, 1998. The most controversial public interest debates arise when the government attempts to direct programming choices. This, of course, raises First Amendment concerns. The "public interest" question at issue here, to my mind, does not run to programming but to the qualifications of a government licensee, a clear communications purpose.

[3] It is well established that equitable measures to curb discriminatory impact do not violate the constitution. Such measures are not punitive, but instead equitable responses to business practices that may inadvertently affect

authorization to operate under the license for up to eight years before renewal, and most are given an expectancy of renewal.[4] These measures allow licensees to make substantial investments in their stations. It is an appropriate and efficient response for the government to require limited neutral measures to curtail discrimination on an ongoing basis, rather than await petitions to oppose a license renewal.

Third, though not explored in the Order, I would have liked to explore additional bases on which to justify EEO rules that are not hinged on diversity rationales. For example, section 1 of the Communications Act identifies as one the Commission's responsibilities the regulation of interstate and foreign communications services so as to make them available, "so far as possible, to all people of the United States, without discrimination on the basis of race, color, religion, national origin and sex. . . ." 47 U.S.C. § 151. Though the conveyance of a license does not confer any property interest, a licensee is entitled to build a lucrative business and enjoy the profits exclusively that emanate from the license. I think it legitimate to attempt to widen the circle of those Americans that benefit from the fruits spawned by a license. One clear way to do so is to give as broad a cross-section of the public as possible the chance to work in enterprises built upon these licenses. Requiring a licensee to recruit broadly furthers the Congressional objective of making communication by wire "available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex," without substantially intruding on a licensee's commercial and business judgments. *Id.*

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suspect class members. This is the foundation of discriminatory impact claims under Title VII.

[4] *See, e.g.*, 47 U.S.C. § 307(c)(1); 47 C.F.R. § 73.1020.

For the preceding reasons, I support this item. I must confess, however, my discomfort about our continued desire to place extraordinary weight on the relatively tenuous nexus between the hiring of low level employees and its impact on diversity of programming.[5] I am dubious of its validity and deeply worried that the courts have begun to view such rationale with dire skepticism[6] I certainly hope that by proffering this rationale (again despite the *Lutheran Church* court's disapproval), we have not invited the judiciary to fracture any remaining legal foundation for diversity objectives.

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[5] I reserve judgment on the nexus between owners (or executive management) and programming. The Order frequently blurs the nexus issue between those that involve owners and those that involve employees generally.

[6] I reserve judgment on the nexus between owners (or executive management) and programming. The Order frequently blurs the nexus issue between those that involve owners and those that involve employees generally.

DISSENTING STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (1998), the United States Court of Appeals for the D.C. Circuit ruled that this Commission's Equal Employment Opportunity regulations denied the equal protection of the laws to persons seeking employment at broadcast stations. Those regulations also made broadcasters, the Court said, "involuntary participants in a discriminatory scheme." *Id.* at 350. To have established and enforced a program that required regulatees to engage in the most historically odious sort of discrimination against potential employees -- discrimination based on race -- was a most grievous offense.

After careful consideration, I am not persuaded that the Commission's efforts to conform those regulations to the requirements of Equal Protection are adequate. Unfortunately, the revised regulations bear some of the same characteristics that led the Court of Appeals to find the original rules unconstitutional. Because these rules are not clearly constitutional, I cannot support their adoption. Moreover, I have doubts about significant parts of the Commission's theory of statutory authority for the regulations. Accordingly, I cannot support adoption of this Report & Order, however well-intentioned it might be.

I. The Regulations Are Susceptible To Reasonable Constitutional Doubt

The Order's conclusion as to the constitutionality of the outreach rules appears to hinge on the assertion that they are wholly race-neutral and thus not subject to strict scrutiny under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *See, e.g., Report & Order* at para. 210 (arguing that EEO requirements "do not raise equal protection concerns"); *Id.* at

para. 217 (contending that outreach requirement is "race-neutral and . . . not subject to strict scrutiny" and "raises no equal protection concerns"); *Id.* at 218 (asserting that commenters' arguments against race- and gender-targeted recruiting "are moot"). For the reasons that follow, I must question whether this is correct.[1]

A. The Regulatory Scheme Is Not Neutral With Respect To Race And Gender

As a factual matter, the instant rules go further than simply requiring outreach to all people, without regard to race. In several places, the regulations expressly employ race-based classifications and require broadcasters to so classify persons for reporting purposes. Moreover, the Commission's enforcement plan undermines the asserted race-neutrality of the outreach requirement. Finally, the impact of the overall regulatory scheme on the behavior of broadcasters reaches all the way to hiring, not just recruiting, decisions; the scheme subtly impels broadcasters to make all such decisions with an eye toward achieving some level of racial representation, even "balance," of employees and applicants.

Under the specific EEO program requirements of Track A, a station potentially must "co-sponsor[] at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities." 47 CFR section 73.2080(c)(2)(iii). A station could also be required to "list[] . . . each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women

[1] In this statement, I focus on the broadcast rules. My points as to their constitutionality apply with equal force to the cable rules, however.

and minorities." *Id.* section (c)(2)(xii). Although the Commission discontinues its prior practice of requiring the use of minority- and women-specific referral sources -- suggesting that this action insulates the plan from being described as "targeted" outreach, *see Report & Order* at para. 218 -- these new requirements do essentially the same thing. Broadcasters no longer have to use minority- and women-specific groups as referral sources, *cf. Lutheran Church*, 141 F.3d at 351 (noting minority-specific referral source rule), but the menu of options includes a requirement that they sponsor job fairs and list jobs with such groups.

Pursuant to the alternative recruitment requirements of Track B, a station must maintain "data reflecting the recruitment source, gender, and racial and/or ethnic status of applicants for each full-time job vacancy filled" by the station. 47 CFR section 73.2080(d)(1). In addition, a station is required to include in its public file report "data reflecting, for each recruitment source utilized for any full-time vacancy. . ., the total number of applicants generated by that source, the number of applicants who were female, and the number of applicants who were minority, Identified by the applicable racial and/or ethnic group with which each applicant is associated." *Id.* section (d)(2).

Finally, per the rule reinstated today, all stations must file FCC Form 395-B, the Annual Employment Report. Section V of that document requires the charting of employees by job category and by male and female groupings subdivided into "White (not Hispanic)," "Black (not Hispanic)," "Hispanic," "Asian or Pacific Islander," and "American Indian, Alaskan native." *See Report & Order*, Appendix D. A rule requiring broadcasters to place people in boxes on a chart with race

and gender categories on its face uses race-based classifications.

Although the actual mandate that stations widely disseminate vacancy information makes no reference to race or gender, see 47 CFR 73.2080(c)(1)(i), the overall scheme adopted today pressures broadcasters to target potential applicants and possibly even employees on the basis of race and gender -- whether proceeding under Track A or Track B.

The "self-assessment" rule, which applies under both Tracks, requires a station to "analyze its recruitment program on an ongoing basis to ensure that it is effective in achieving broad outreach to potential applicants, and address any problems found as a result of its analysis." *Id.* section (c)(3). Also, in order to have its license renewed, a station must have complied with all substantive EEO requirements, such as the outreach rules, during the prior license period. The FCC conducts compliance review at the time of license renewal.

By what measure does one test the "effectiveness" of outreach? According to the Order, one gauges the adequacy of outreach efforts by the number of women and minorities in applicant pools, and even in employment profiles.

Specifically, the Order provides that in order to "demonstrate" to the Commission that an outreach program under Track B "is inclusive, i.e., that it widely disseminates job vacancies," a station must "collect data tracking the recruitment sources, gender, and race/ethnicity of its applicant pools." Report & Order at para. 104. This information will allow the broadcaster and the Commission to "evaluate whether the program is effective." *Id.* But "if the data collected does not confirm that notifications are reaching the entire community, [the

Commission] expects a broadcaster to modify its program as warranted so that it is more inclusive." *Id.*[2]

The Commission noisily disclaims that proportionality with the local labor force will be the exclusive test for adequacy of applicant pool composition. At the same time, it admits that it will have to rely, at least in part, on the numerical representation of minorities and women in applicant pools in order to assess compliance with the outreach rule. *Id.* at para. 120 (denying proportionality requirement for applicant pools but stating that "few or no" minorities or women would indicate inadequate "inclusiveness").

Clearly, then, applicant pools must achieve some numerical level of minority and women applicants in order for a station's outreach program to be deemed EEO compliant. The Commission declines to say, however, just what that composition is. Thus, the Commission makes plain its intent to use numerical data on the race and gender of applicants to evaluate outreach efforts -- and even vows to require heightened efforts of broadcasters' whose data is inadequate -- but is Strikingly silent on just how many minority and women applicants are enough. Eventually, the Mass Media Bureau will

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[2] *See also Id.* at para. 8 (records concerning the race, ethnicity, and gender of applicants must be maintained in order to "monitor whether. . . outreach efforts have been successful in achieving broad outreach" and "if the data collected indicates that outreach has not been inclusive, a broadcaster . . . will be expected to adjust its outreach program accordingly"); *Id.* at para. 105 (describing the possibility of "verifying broad outreach using applicant pool data"); *Id.* at para. 113 (describing collection of applicant pool data by station as necessary to "demonstrate that its outreach efforts are inclusive"); *Id.* at para. 115 (stating that "applicant flow data. . . will be one source of information concerning a broadcaster's EEO efforts that we may, as warranted, utilize in determining whether a broadcaster has demonstrated compliance with our EEO rule").

be forced to come up with some kind of processing guidelines for review of outreach programs.

Once one focuses on race and gender statistics, however, it is difficult to come up with anything other than proportionality, or some derivative of proportionality, as a calibrator of adequacy. The only other number with significance I can Identify would be zero; one could say that the absence of minorities and women in applicant pools would establish noncompliance. Beyond zero, however, it is hard to say that any one number is materially more meaningful than another. Conversely, whatever the Commission requires to demonstrate "effective" outreach, it surely could not require more than proportionality.

Given the lack of any other guidance as to compliance with the outreach rule, rational broadcasters wary of regulatory trouble will strive for some showing of rough proportionality in their applicant pools. At the very least, they will strive to have at least one woman or minority in every pool; while this is not a proportionality requirement, it is a fixed number or quota. *Cf. Lutheran Church*, 141 F.3d at 390 (reasoning that "the fact that the Commission looks at more than 'numbers' does not mean numbers are insignificant" since "a station would be flatly imprudent to ignore any of the factors it knows may trigger intense review" and "can assume that a hard-edged factor like statistics is bound to be one of the more noticed . . . criteria").

The fact that the standard by which Track B outreach programs, neutral on their face, will be judged is by counting minority and female applicants that wind up at the station makes it hard if not impossible to call this regulatory plan truly "race-neutral." The Commission has built into the back end of its policy what it shrewdly omitted from the face of the dissemination rule -- that is, a requirement of some minimum (though vaguely defined) numerical representation of minorities

and women in applicant pools.[3] Cf. Lutheran Church, 141 F.3d at 390 (reasoning that "the Commission has used enforcement to harden the suggestion" in its regulations).

The Commission also makes clear that the records broadcasters must keep under Track A regarding the referral sources of ultimate hires, see 47 C.F.R. section 73.2080(c)(5)(ii), (v)-(vi), are "designed to provide a starting point for a broadcaster to analyze the success of its recruitment efforts." Id. at para. 118. But "if it appears that, despite a broadcaster's outreach efforts, an excessive number of hires or interviewees are coming from inside, 'word-of-mouth' recruitment sources, we will expect the broadcaster to consider whether its recruitment efforts are achieving a sufficiently broad outreach." *Id*; *see also Id.* at para. 115 (stating that "data as to the recruitment sources of the broadcasters' interviewees and hirees . . . will be one source of information concerning a broadcaster's EEO efforts that we may, as warranted, utilize in determining whether a broadcaster has demonstrated compliance with our EEO rule").

Clearly, then, the outreach regulations do not stop at the line between recruiting and hiring, as the Commission repeatedly asserts. As I read the plain language of the *Report and Order* cited above, a broadcaster could engage in every single act of outreach required under Track A but still be deemed

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[3] There are, of course, practical problems with using the number of persons who apply for a job to measure the number of people who received notice of the job. *Cf. City of Richmond v. J.A. Croson, Inc.*, 488 U.S. 469, 507 (1989) (criticizing the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population"). There are virtually infinite reasons why a person who hears about a job might not ultimately apply for it -- perhaps they are already employed, or maybe they are not as interested in a broadcasting career (not the most dynamic sector of the communications industry today) as the Commission thinks they should be.

noncompliant for failing to hire from referral sources with sufficient frequency, instead hiring too many people by word of mouth. Thus it is not just outreach that is required for compliance. Instead, broadcasters operating under Track A must avoid hiring "through an insular recruitment and hiring process," thereby "replicating" a "homogenous workforce" in which "minorities and women are poorly represented." *Id.*, at para. 3.[4] And the data on referral sources of employees will be used to police those hiring decisions.

Thus, under Track A, broadcasters who are not discriminating against anyone in the hiring process -- indeed, who have never discriminated against anyone -- are not free to decide to hire whoever they want, as the Commission asserts. The Report & Order makes clear that they are expected to hire a certain amount of employees from referral sources. These rules are clearly aimed at a broadcaster's employment decisions and are meant to affect the racial composition of his staff by preventing the "replication" of "homogenous" staffs. I do not see how this language can be squared with the Commission's repeated claim that it has no intention of regulating hiring or injecting race and gender considerations into such decisions, and that its rules create no preferential effects whatsoever in hiring.[5]

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[4] If the broadcaster refuses to hire applicants because of their race or gender, that is of course another thing, and wholly actionable under employment discrimination laws.

[5] The breadth of this policy -- which limits the ability of broadcasters to hire based on "word of mouth," without any evidence of past or present discrimination -- is remarkable when compared to Title VII. Under Title VII, employment "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power*, 401 U.S. 424, 430 (1971). The Commission relies on a similar perpetuation-of-discrimination theory in order to tie the outreach

Another measure of the efficacy of outreach under either Track A or B, according to the Order, is station employment profiles collected on Form 395. In explaining why it collects this expressly race- and gender-based hiring data, the Commission states that the data is necessary "in order to assess . . . the effectiveness of the new rules in achieving our objective[] of inclusive outreach." Report & Order at para. 164. The Commission further explains that "an increase in the number of women and minorities employed in the broadcast . . . industry would indicate that our EEO requirements are effective in ensuring outreach." *Id.* If these employment numbers do not prove satisfactory to the Commission, it "will not hesitate to propose changes to [the] EEO rules if industry trends suggest that [they] are not effective." *Id.*

In other words, if broadcasters do not achieve some minimum level of minority and female employment, the Commission will impose added regulation -- and thus greater

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rules to the non-discrimination (as opposed to the diversity) rationale. *See Report & Order* at para. 3 ("We believe that repeated hiring without broad outreach may unfairly exclude minority and women job candidates when minorities and women are poorly represented in an employer's staff. . . . Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process."). Generally, however, there must first be a showing of "prior discriminatory employment practices," *Griggs,* 401 U.S. at 430, to warrant the inference of present, continuing discrimination. Yet the Commission presumes present discrimination on the part of those who make hiring decisions whenever minorities and women are "poorly represented" at stations, without any evidence whatsoever of past or present bad acts. Absent such evidence, the Commission's policy begins to look like one of "outright racial balancing." *Lutheran Church,* 141 F.3d at 355. Even on the Commission's own dubious logic, however, the outreach rules could apply only to stations with "poor representation" of the suspect classes, for only in those circumstances could there be any chance of the "replication" effect that the Commission seeks to prevent.

costs -- upon them. I do not think it can be denied that an express threat of greater industry regulation creates a strong incentive to achieve the Commission's stated desire. Again, left without any clear idea as to what those employment profiles should look like, the rational broadcaster -- or industry as a whole -- will probably set its sights on something approaching proportionality and, if not that, at least some minimum number of minorities and women.

Finally, the Commission takes the highly irregular step of keeping open the docket in this proceeding, notwithstanding the adoption of final rules and regulations. *See Id.* at 229. While it does not "at this time" pursue a direct remedial approach to the employment of minorities and women, the Commission will permit the submission of information "germane" to such regulation, such as a national employment disparity study. Id. The Commission "will consider any [such] submissions" and "determine [whether] action is appropriate at a later date." This action is "to facilitate any additional proceedings upon further Order," *Id.* at para. 238, and to "facilitate the submission of information relevant to employment disparities," FCC Press Release on EEO Regulations (Jan. 20, 2000).

Again, this none too subtly suggests that if subsequent studies show a "disparity" in the employment of minorities and women -- not of broadcasters' failure to make job information widely available to any and all persons -- the Commission will take further regulatory action. Indeed, by keeping the docket open in this proceeding, the Commission actively invites such submissions and keeps the possibility of further rulemaking very much alive; no future Commission need obtain a majority vote in order to initiate a rulemaking on this matter. Had the docket simply been closed, as normally occurs when final rules are adopted, nothing would have prevented parties from filing any studies they wish with the Commission. But by leaving the docket conspicuously open, the Commission keeps the motor

on this regulatory vehicle running, allowing for immediate reentry onto the regulatory fast track. The drone of that motor is more than background noise for broadcasters; it is a constant reminder of an express threat of more regulation.

In short, the *Report & Order* attempts to walk an excruciatingly fine constitutional line. It deletes the requirement that broadcasters use minority- and women-specific referral sources, but replaces that with other race- and gender-specific recruiting requirements, such as the job fair and job listing rules. And although the Commission does not use race or gender classifications in the text of the outreach requirement, it makes clear that in enforcing the regulations it will expressly consider the race and gender composition of applicant pools in order to assess the "effectiveness" of a station's outreach under Track B. Under Track A, the Commission intends to track hiring from referral sources and indicates that a broadcaster's failure to hire from referral sources with sufficient frequency will present a regulatory problem. The Commission has also made clear that race- and gender-based employment data will be used to assess the effectiveness of the rules under both Track A and B, promising more regulation and less discretion for broadcasters if the current regime proves to achieve results that are, in its opinion, inadequate. Finally, the Commission declines to close this proceeding, inviting the filing of information on employment "disparities" for minorities and women.

Does this system influence or encourage hiring based on race? A reviewing court very well might find that it does. Given the realities of the overall scheme and the Commission's self-avowed purpose of influencing the racial composition of broadcast employment ranks, I for one see a real risk that these regulations and the accompanying Order will operate to "pressure -- even if they do not explicitly direct or require -- stations to make race-based hiring decisions." *Lutheran Church*

v. FCC, 154 F.3d at 491; *see also Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (en banc) (discussing the "variety of *sub silentio* pressures and 'raised eyebrow' regulations" to which broadcast licensees are subject and holding that facially neutral regulations can be invalid if they increase the likelihood of self-regulation "to avoid official pressure and regulation"); *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1098, 1105, 1117 (C.D. Cal. 1976) finding that informal "jawboning" by agency officials is judicially reviewable), *vacated and remanded on jurisdictional grounds sub nom., Writers Guild of America v. ABC*, 609 F.2d 355 (9th Cir. 1979) (agreeing that "the use of these techniques by the FCC presents serious issues involving the Constitution, the Communications Act, and the APA"), *cert. Denied*, 449 U.S. 824 (1980). Indeed, one of the stated goals of the regulations is to affect the racial design of the employment force at broadcast stations, as well as the racial composition of station owners, in order to promote "diversity of programming." *See, e.g.* Report & Order at para. 59 (asserting nexus between employment and programming diversity).

Even if the regulations do not influence or encourage *hiring* based on race, they certainly impel *recruiting* based on race. This is due to the use of applicant pool data to evaluate the adequacy of outreach programs, as explained above. The Commission has not eliminated race-based decisionmaking under the EEO regulations, rather it has moved such decsionmaking one step back in the employment process.

The Order opines that such decisionmaking is harmless, however, because no one is injured when the pool of applicants is merely expanded. This view goes more to standing than to the merits of the Equal Protection issue. In any event, the substantive problem with this view is that it assumes an infinitely expandable pool of recruits, applicants, and

interviewees. That assumption, while not without rhetorical appeal, is open to doubt.

At some point, a broadcast station, just like any other business, must draw the line on how many people it can afford, in terms of time and money, to recruit and interview. And when a station draws that line, these regulations might cause it to leave candidates not of the Commission's preferred race or gender standing on the other side. Those persons who are not selected as recruits or interviewees stand less of a chance of getting the job, of course. Thus, a person may be denied an opportunity to compete for the job on the same basis as all others -- that is, they may be passed over for an interview or not recruited for a position based on their race. In this way, they have been harmed by a governmental scheme that incents the broadcaster, in order to achieve an acceptable applicant pool composition, to prefer one person as a recruit because of their race. *See Texas v. Lesage*, Sup. Ct. Slip Op. 98-1111 (Nov. 29, 1999) ("[A] plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit 305] in question if race were not considered. The relevant injury in such cases is 'the inability to compete on an equal footing.'") (*quoting Northeastern Fla. Chapter, Associated Gen, Contractors of America v. Jacksonville*, 508 U.S. 656, 667 (1993)); *see also* Comments of Institute for Justice at 4-5 (explaining harm caused by outreach rule).

For the foregoing reasons, I think the Commission's outreach rules are not merely cognizant of race and gender in the way that, for example, prohibitions on discrimination are. Instead, they classify people based on their race and gender, require broadcasters to do so, and encourage broadcasters to prefer people of a particular race or gender over others as recruits, and even as employees. This regulatory scheme is not clearly race-

or gender-neutral with respect to the distribution of benefits in the employment process.

In contrast to the programs established in the Order, the proposal submitted by the Broadcast Executive Directors Association (BEDA) provides an example of a race- and gender-neutral outreach plan that would present no Equal Protection problem. *See* Report & Order at para. 82. In its final proposal, BEDA suggested that stations, among other things: post notices of full-time vacancies either directly or through its State Broadcast Association to any group that asks in writing to receive such notification; advertise full-time vacancies over the air, in local newspapers of general circulation, or on the internet; and, if using the internet, promote the website on the air. Stations would not be required to document the race and gender of applicants or interviewees or maintain records as to the source of referrals.[6]

These requirements effect the broad dissemination of information, and they do so without regard to the race or gender of the recipients of that information, job applicants, or ultimate hires. This, in my view, is what the phrase "race-neutral" means. This, in my view, is the kind of plan that doubtless "merely requires stations to implement racially neutral recruiting and hiring programs," *Lutheran Church*, 141 F.3d at 351, and thus does not trigger equal protection concerns. As one commenter succinctly put it, and as BEDA's plan shows, "broad outreach does not necessitate race-conscious action and can easily be accomplished through race-neutral means." Comments of Institute for Justice at 9. The Commission, however, never explains why an unquestionably neutral

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[6] See Letter to Chairman William E. Kennard from Richard R. Zaragoza on behalf of the Broadcast Executive Directors Association, in the Matter of Equal Employment Opportunity, MM Docket Nos. 98-204 and 96-16, Dec. 29, 1999.

program would be inadequate to meet its stated goals, but instead continues to insist upon the collection and use of race and gender data and race- and gender-specific regulation. To my mind, a program such as that put forth by BEDA would have been the wiser constitutional course.

B. The Legal Precedent for the Constitutionality of the Rules Is Weak

Upon examination of the cases cited by the Commission as support for the constitutionality of these regulations, that precedent appears relatively weak. At best, the constitutionality of targeted outreach appears to be an open question in the vast majority of federal judicial circuits, including the D.C. Circuit. See *Lutheran Church*, 154 F.3d at 492 ("Whether the government can encourage -- or even require -- an outreach program specifically targeted on minorities is. . . a question we need not decide."). At worst, targeted outreach requires race-based decisionmaking, triggering strict scrutiny under the Equal Protection Clause.

Contrary to the assertion in the Order, it is simply not true that "courts have consistently held that recruitment measures designed to expand the applicant pool, and that do not favor anyone in the applicant pool on the basis of race, are race-neutral and are not subject strict scrutiny." Report & Order at para. 217 & n. 352.[7] I address *seriatim* each cite cited for this proposition.[8]

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[7] As discussed above, this characterization of the Commission's program as not creating pressures to favor any class of persons in the hiring process is subject to dispute.

[8] Curiously, the Commission characterizes its outreach program as non-targeted, but relies upon cases involving mostly targeted programs. I address the cases in any event, since it appears to me that the regulations are, as a practical matter and as previously explained, specifically aimed at minorities

Raso v. Lago neither addressed nor decided the standard of review for targeted outreach programs under the Equal Protection Clause. That case involved the interaction of a Massachusetts law granting a preference to former residents of Boston's "West End" for apartments in a new housing development, federal housing regulations requiring developers to engage in minority outreach for residents, and an extant consent decree governing the development that required a particular racial composition of residents. The state law preference for former "West Enders," which was entirely race neutral, had the effect of creating a preference for whites in the new development because most West Enders were white. HUD felt that implementation of the state law preference directly conflicted with its regulations as well as the consent decree, to which it was a party. HUD thus negotiated an agreement whereby the statutory preference for West Enders would be curtailed.

HUD's targeted outreach regulations were not the focal point of the challenge in that case. As the Court observed, "outreach efforts are not the real source of the plaintiffs' problem -- rather, it is the partial loss of their preference." 135 F.3d at 17 n. 8. As to the plaintiffs' ancillary attack on the regulations themselves, the Court rejected it on the ground that it had been "essentially abandoned on appeal." Id. at 17. So, to the extent that the outreach regulations were themselves challenged, the Court did not address that claim on the merits but instead found it waived.[9]

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and women.

[9] In response to the primary challenge, the Court of Appeals held that HUD did not violate the Equal Protection Clause when it cut back on the statutory preference for West Enders in order to make housing available to all, regardless of race. There was no record evidence that the HUD plan distributed housing based on any racial classifications. 135 F.3d at 16.

Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997), did not uphold targeted outreach requirements against Equal Protection attack, or decide the applicable standard for such review, either. Instead, that case involved a reverse discrimination hiring claim under Title VII. Although the Court reasoned that affirmative efforts to recruit minorities and women result in no harm to others, it did so in the course of deciding that the existence of such a program was not enough to support a finding that the defendant employer's asserted reason for hiring someone other than the plaintiff was pretextual. See 123 F.3d at 1038 (holding that "we [do not] believe that the [defendant's] alleged interest in obtaining a pool of diverse applicants can support a finding of pretext" in hiring). Because the plaintiff's other evidence of "pretext" was also unpersuasive, the employer was not liable for employment discrimination under Title VII. This case thus did not hold that outreach measures are "race-neutral," regardless of group targeting, and thus not subject to strict scrutiny.

Neither does *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994), stand for the asserted proposition. The question presented there was not whether the targeted outreach required by the consent decree in that case was subject to strict scrutiny, but whether the race-based hiring "goals" in the decree violated Equal Protection. In the course of ruling those goals unconstitutional, the court said that the fact that the city had engaged in "race-neutral" efforts to solve its employment

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Rather, it sought to mitigate the effects of a law that might have subjected HUD to sanctions under the consent decree. *Id.* at 17 ("HUD's concern that the preference, in this instance, if unmodified, would restrict the preference to whites and subject HUD to sanctions under the consent decree" was not an illegitimate, race-based motive). In closing, the Court expressly noted the limited scope of its holding. *Id.* ("It is one thing for HUD to insist that all apartments it subsidizes must effectively be open to all races" but "it would be quite another thing if HUD planned to impose this requirement only where the beneficiaries of the statutory preference were white.").

problems did not save their hiring goals under strict scrutiny. In describing those prior efforts, the court observed that the city "actively encouraged blacks to apply for jobs" and that "the consent decrees themselves required strengthened recruitment of blacks and women." *Id.* at 1571. Admittedly, the Court described, in dicta, targeted recruiting programs as "race-neutral" in the course of evaluating another aspect of the decrees' constitutionality. But it did not decide the question -- as no party raised it -- whether the targeted recruiting was itself constitutional, or what the applicable standard of review for such a program would be.

The same is true of *Peightal v. Metropolitan Dade County*, 26 F. 3d 1545 (11th Cir. 1994). Again, in the course of determining "whether a race-conscious remedy" -- specifically, a hiring preference -- was "narrowly tailored to serve a compelling state interest," the Court undertook the "initial inquiry" of asking whether the government had met its obligation first to consider race-neutral measures. *Id.* at 1557. As in *Seibels*, the Court characterized a recruiting program aimed at minorities and women as "race-neutral" and concluded that the city had therefore met its obligation to take such measures before introducing the hiring quotas. *Id.* at 1557-1558. But no challenge was made to the recruiting program itself, and this case therefore never held that such programs are race-neutral for purposes of analyzing their constitutionality under the Equal Protection Clause.

That leaves one district court decision, *Shuford v. Alabama State Board of Education*, 897 F. Supp 1535 (M.D. Ala. 1995). Unlike the foregoing cases, this one does analyze the constitutionality of affirmative outreach programs. And it does reason that procedures that only expand the applicant pool -- that are "inclusive" as opposed to "exclusive" -- and that do not affect hiring decisions are not subject to equal protection analysis.

By its own admission, however, the district court's reasoning "presents a new method of looking at affirmative action." *Id.* at 1551. The court candidly recognized not just the novelty of its analysis, but that the analysis actually "is a deviation from general affirmative-action case law." *Id.* at 1556. It is this portion of the opinion that the Order cites. See Order at para. 24 n.4. If this is the best case that can be cited for the Commission's legal theory of the race-neutrality of targeted outreach, then the precedent for that theory is weak, to put it mildly.

Of course, the above-discussed cases are from the lower federal courts. The last word from the Supreme Court on "race-based decisionmaking" is *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The Court has never since suggested that the phrase "race-based decisionmaking," as used for purposes of Equal Protection analysis, means anything other than what its plain terms indicate: the making of choices -- whether to fire, pass over for a promotion, hire, interview, or recruit a person -- on account of an individual's race. Of course, the D.C. Circuit has already expressed its skepticism that Adarand can be limited to hiring decisions: "Under Title VII, courts have distinguished between 'preliminary' and 'ultimate' employment decisions. . . . [but] the Equal Protection Clause would not seem to admit such a de minimis exception." *Lutheran Church*, 141 F.3d at 351.

II. The Commission's Theory of Statutory Authority Is Problematic

The Commission's argument for statutory authority to regulate broadcast employment appears to rest in large part on a ratification theory.[10] *See* Report & Order at para. 21. Under

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[10] I do not doubt that section 634 of the Communications Act grants the Commission statutory authority to make EEO rules for cable systems,

the cases cited by the Commission, however, *see Id.* at para. 26 & n.39, it is not the agency practice itself that Congress blesses post hoc, but rather the agency's construction of a particular statutory provision, pursuant to which it has purportedly acted, that Congress implicitly accepts.[11] Thus, although section 334 is indeed an explicit legislative recognition of the Commission's EEO practices at the time of its enactment in 1992, there must have been some other grant of authority under which the Commission promulgated the EEO regulations, the construction of which Congress then ratified when it enacted section 334.

In fact, the express and exclusive provisions relied upon by the Commission in adopting EEO rules were the "public interest" provisions of Title III. *See* Nondiscrimination Employment Practices of Broadcast Licensee, 13 FCC 2d 766 (1968); 18 FCC 2d 240 (1969); 23 FCC 2d 430 (1970); 44 FCC 2d 735 (1974). The Report & Order even acknowledges that the "ratification" argument necessarily relates back to the "public

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according to the dictates of that provision. Whether the statute itself is constitutional, and whether the Commission has complied with those dictates, are other matters.

[11] See *Haig v. Agee*, 453 U.S. 280, 300 (1981) (holding that Congress had approved of administrative "interpretation [of the Passport Act of 1926]" as statutory authority for passport regulations); *Lorillard v. Pons*, 434 U.S. 575 (1978) (holding that Congress was presumed aware of the judicial construction of the Fair Labor Standards Act as requiring a jury trial when it incorporated sections of that law in the Age Discrimination in Employment Act); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (holding that Congress had approved of administrative construction of the 1926 Passport Act's "broad rule-making authority" as basis for passport regulations); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933) (holding that Congress had acquiesced in administrative practice pursuant to 1922 Tariff Act and explaining that "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the [statutory] command is indefinite and doubtful," thus presuming a contemporaneous statutory command).

interest" parts of the Communications Act. See Report & Order at para. 26 (arguing that Congress has long known of the Commission's position that "it has authority under the public interest mandate to adopt and enforce EEO rules") (emphasis added).

Even if accepted as a legitimate method of statutory construction, all that the majority's ratification theory proves is that Congress in section 334 acquiesced in the Commission's historic reading of the public interest language in Title III. Although it is difficult to untangle the Commission's ratification argument from its section 334 argument, it seems that, at bottom, the Report & Order relies upon the "public interest" standard as an ultimate source of asserted authority for these regulations.[12] To the degree that it does so, the Report & Order is not on firm legal ground. And, for reasons described below, section 309(j) does nothing to improve that situation.

A. Both Prongs of the Commission's "Public Interest" Standard Suffer From Legal Flaws

Originally, the EEO rules were adopted in the "public interest" of furthering the general national policy against employment discrimination, as evidenced in Title VII of the Civil Rights Act of 1964. Later, the Commission stated that the regulations were meant to create diversity of programming. See 13 FCC 2d 766. *See* Nondiscrimination in Employment Practices (Broadcast), 60 FCC 2d 226, 229 (1976), reversed on other grounds, *Office of Communications of the United Church of Christ v. FCC*, 560 F.2d 529 (1977). Since then, the Commission has alternated between these goals as independent rationales or cited them as complementary aims.

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[12] For radio licensees, the public interest language, without any "ratification" of its construction, is all the Commission has; section 334 applies only to television licensees.

Most recently, in the *Lutheran Church* litigation, the Commission clung solely to the diversity of programming goal, disavowing any reliance on non-discrimination. *See* 141 F.3d at 354. Today, it takes the opposite tack, deliberately downplaying the diversity of programming rationale. *See* Report & Order at para. 4 (non-discrimination goals "would be sufficient in themselves to warrant non-discrimination and outreach requirements" but the rules "also serve an important, constructive function in fostering greater diversity of viewpoints and programming").

Over time, and as described in detail below, each rationale has been drawn into question by the courts as a basis for employment discrimination rules. This, of course, explains the Commission's veering back and forth between the Scylla and Charybdis of its "twin aims." In the end, I am not sure that these regulations -- in so far as they derive from the "public interest" sections of the Communication Act -- will make it safely through the statutory strait.

1. The Scylla of Non-Discrimination.

As noted above, the original and exclusive policy goal of EEO regulations was founded on a pure nondiscrimination principle. Reliance upon the non-discrimination theory was perhaps fine, as a legal matter, in the 1960s. But reliance upon the goal of non-discrimination pursuant to statutory "public interest" provisions is now questionable under Supreme Court and D.C. Circuit precedent.

In *NAACP v. Federal Power Commission*, 425 U.S. 662 (1976), the Supreme Court held that the "public interest" provision of the Federal Power Act did not confer statutory authority upon the Federal Power Commission to regulate the employment practices of its regulatees. The Court stated that its "cases have consistently held that the use of the words 'public

interest' in a regulatory statute is not a broad license to promote the general public welfare." *Id.* at 669.

Under *NAACP v. Federal Power Commission*, then, the Commission can not just promote the policy of nondiscrimination -- as laudable a goal as that is -- but must promote goals with a "'direct relation,'" to the purposes of the Communication Act, *Id.* (quoting *New York Central Securities Corp. v United States*, 287 U.S. 12, 24-25), such as the efficient distribution of radio spectrum.[13] Indeed, the Supreme Court went out of its way in that case to characterize the FCC's employment regulations as tied to the communications policy goal of "ensuring that . . . licensees' programming fairly reflects the tastes and viewpoints of minority groups," *Id.* at 670 n. 7, as opposed to a non-discrimination goal. Likewise, in express recognition of the import of *NAACP v. FPC*, the D.C. Circuit has described the Commission's EEO program as regulating "the employment practices of its licensees only to the extent those practices affect the obligation of the licensee to provide programming that 'that fairly reflects the tastes and the viewpoints of minority groups,' and to the extent those practices raise questions about the character qualifications of licensees." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F2d 621, 628 (1977) (emphasis added).[14]

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[13] Some of the Commission's stated goals clearly fail this test. For example, the Commission asserts it belief that the regulations will "increase our understanding of those from different backgrounds, decrease the sense of isolation of minority groups, and help us build bridges across racial, ethnic and socioeconomic divides." Report & Order at para. 4. While perhaps part of a broad social or even religious agenda, these are not directly related to communications policy.

[14] Not coincidentally, it was not until 1976 -- just months after Federal Power Commission was handed down -- that the Commission first articulated an end other than nondiscrimination for its EEO policies. *See* Nondiscrimination in Employment Practices (Broadcast), 60 FCC 2d at 229

Justifying the EEO rules as furthering an aim of nondiscrimination under the "public interest" standard is thus clearly problematic.[15] n15 Indeed, this proposition is so obvious that the *Lutheran Church* court -- having undermined the legitimacy of the alternative rationale of diversity of programming -- noted the statutory authority issue sua sponte and remanded the question for our consideration. *See* 141 F.3d at 354, 356.

2. The Charybdis of Diversity of Programming.

In view of the foregoing caselaw on statutory authority to prohibit employment discrimination under the "public interest" standard, the Commission might like to turn to the alternative rationale of programming diversity, as it did in the *Lutheran Church* litigation. But as susceptible as the anti-discrimination rationale is to doubt, the diversity rationale is even more so.[16]

First, the *Lutheran Church* court criticized the Commission's vague use of the term "diversity" of programming. The Court of Appeals observed that "the Commission never defines

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(EEO rules are meant to promote diverse programming).

[15] To the extent that the Commission wishes to rely upon character qualifications, as opposed to pure non-discrimination or diversity of programming rationales, it is hard to see why all holders of Title III licenses would not be subject to this same understanding of character adequate to hold a federal license. Such a definition of "character" seems arbitrarily limited to broadcasters, as opposed to all Title III license holders, of which there are many other than traditional broadcasters.

[16] No doubt this is why the Commission tries to link the outreach rule to the non-discrimination rationale, *see* Report & Order at paras. 3, 40 (discussing "perpetuation-of- discrimination" theory as basis for outreach rules), as opposed to the diversity rationale. As noted supra n. 5, the theory employed to justify the outreach rule as necessary to prevent discrimination goes far beyond even the broadest propositions of employment discrimination law.

exactly what it means by 'diverse programming.'" 141 F.3d at 354. On remand, this Report & Order provides no clearer a definition of "diversity" than the Commission articulated in that litigation. In fact, the Report & Order does not even attempt to grapple with this issue by, for example, distinguishing between the sorts of "diversity" it might have in mind or explaining how it measures "diversity." Instead, it speaks of promoting programming that is "responsive to the interests of a diverse community," an entirely circular concept. Report & Order at para. 4. This definitional problem remains as real as ever.

Second, as the D.C. Circuit noted the first time around, "[its] opinion . . . undermined the proposition that there is any link between broad employment regulation and the Commission's avowed interest in broadcast diversity." *Lutheran Church*, 141 F.3d at 356 (emphasis added). Although the Commission cobbles together anecdotal assertions by individual commenters as support for the claimed nexus between the race and gender of station employees and the station's programming, see Report & Order at para. 58, it is highly selective in its choice of quotations; many commenters denied the nexus as a matter of fact, and the Commission never explains why they are wrong or less credible and the others right or more credible. *See Id.* at para. 56 & n.112. In any event, this smattering of personal beliefs provides scant support for the proposition that race and gender correlate with programming choices in a statistically significant enough fashion to justify the instant employment regulations. *Cf. Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) (holding that even under intermediate scrutiny "any 'predictive judgments' concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence").[17]

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[17] Even if there were sufficient evidence of such a correlation, the D.C. Circuit has expressed its "doubt . . . that the Constitution permits the

Consider also the overall relationship between the adopted regulations and the ultimate goal of programming diversity. It is even more attenuated than the essential link between the race/gender of employees and programming discussed above. To get from the regulated behavior to the goal of diverse programming requires numerous leaps of evidentiary logic: first, broad outreach will lead to applicant pools with a certain number of minorities women; second, such applicant pools will in turn create interviewee pools with more minorities and women then otherwise would exist; third, the composition of such interviewee pools will then affect the composition of the employees at broadcast stations; fourth, those employees might someday become owners of broadcast properties; and fifth, those owners will then program stations based on their personal race and gender. This is a daisy chain of hypotheticals.

Equally ill-supported is the specific link between the race and gender of low-level employees and programming output. To get from the coverage of non-editorial employees to its diversity goal, the Commission states its "belief" that "program content is not determined solely by the individuals at the station with authority to select programming, but may also be influenced by interaction between these individuals and other station employees, which exposes the former to the views and perspectives of the latter." Report and Order at para. 55. Upon what record evidence is this assumption based? None. In fact, the Commission later concedes that "it is impossible to establish from empirical evidence the connection between programming decisions and the backgrounds of the decisionmakers." *Id.* at para. 58 (emphasis added). If it is impossible to establish that connection in an empirical context, it is even harder to establish from an individual's purely

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government to take account of racially based differences, much less encourage them." *Lutheran Church*, 141 F.3d at 392.

subjective impression of events at a station. *See, e.g., Id.* (relying upon commenter who states, without offering supporting facts, "I believe that having a diversified staff . . . has helped WNBC be more conscientious towards a wider range of programming and news views") (emphasis added). This is agency speculation of the idlest sort. *Cf. Bechtel v. FCC*, 10 F.3d 1875 (D.C. Cir. 1993) (finding preference for owners who manage stations to be without evidentiary foundation and thus arbitrary and capricious). Worse, it is not even speculation about the actual operation and management of broadcast stations; it is conjecture about social science -- namely, the potential psychological effects that exposure to one human being might have on another.[18]

Instead of real evidence, the Commission's assumptions about the relationship of race and gender to an individual's point of view seem based on impermissible stereotyping. *See generally Lamprecht*, 958 F.2d at 392-394. The Supreme Court has said this about making assumptions about individuals based on their gender: "Discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual capabilities." *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984). For example, "in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted [unlawfully] on the basis of gender." *Price Waterhouse v. Hopkins*, 490 US 228, 250 (1989).

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[18] Where our judgments are afforded deference, it is with respect to areas within our agency's expertise such as, say, the technological nature of digital television. Employment matters do not fall within that zone of expertise and thus deference. *Cf. Bechtel*, 10 F.3d at 881 (stating that where "predictive judgments" underlying a policy concern an area beyond the Commission's expertise, deference to those judgments is not as warranted).

I think it no less an instance of sex stereotyping to say that women are naturally interested in programming or seeing coverage of topics such as "breast cancer" and "premature child birth." *See* Report & Order at para. 58 (citing comments of Cathy Hughes as evidence of nexus between employment of women and program diversity). A woman's pursuit of these topics as a programming executive will depend largely on sex neutral business factors such as her target audience. A woman's interest in these topics as a viewer will depend on personal factors such as her age or marital status; or maybe she would simply rather watch a financial report, a political talk show, or a documentary on international relations. I had hoped we were "beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Price Waterhouse*, 490 U.S. at 250. The Commission cannot simply assume -- or require broadcasters to assume -- that a female station manager would be more likely to take a, say, kinder, gentler, more "feminine" approach to local news or have a certain point of view on political issues. *See Lamprecht v. FCC*, 958 F.2d at 395-396.

Even if it is true that a majority of women are interested in the kind of issues described above, what the law has always respected, whether under Title VII or the Equal Protection Clause, is the abilities and tastes of the individual. As Justice Ginsburg put it, "generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average." *United States v. Virginia*, 518 U.S. 515, 520 (1996). And the above-described problems associated with generalizing about people based on immutable characteristics such as gender go to race-based rules with equal force. Cf. *Lutheran Church*, 141 F.3d at 355 (noting that the danger of perpetuation of invidious group stereotypes is "poignantly illustrated by this case," as "one of the NAACP's

primary concerns was its belief that the Church had stereotyped blacks as uninterested in classical music").

In short, the diversity of programming rationale is riddled with definitional, empirical and, thus, legal flaws. Yet the anti-discrimination rationale has real problems under the Federal Power Commission decision. Choosing between them is like deciding whether to jump into the frying pan or the fire. To the extent that the Commission's section 334 argument and ratification argument relate back to the public interest language of Title III, those arguments are legally problematic.

B. Section 309(j) Provides No Authority For Employment Regulations

To buttress its statutory argument, the Commission also cites section 309(j) of the Communications Act as authority for the EEO regulations. *See* Report & Order at paras. 42-47. This statute provides no support at all for these rules.

It is true enough that Congress expressed certain policy preferences with regard to minorities and women in this section. *See Id.* at para. 42. But those policy preferences are to be implemented, by the plain terms of the statute, "in identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection," the "competitive bidding" section. 47 U.S.C. section 309(j)(3). This item is not a rulemaking to design systems for license auctions. Indeed, it is not about licensing at all. It is about employment practices of existing broadcasters. Section 309(j) simply has no applicability.

III. Conclusion

As set forth above, there is legitimate reason to doubt the constitutionality of these revised EEO regulations. In essence,

the Commission continues to insist on the collection and use of race and gender statistics, whether for assessing applicant pools in order to evaluate the "breadth" of outreach, for assessing the "insular" nature of hiring, or for determining the overall adequacy of the regulations. Although there is no case law squarely against what the Commission has done, neither is there any in direct support of it, as the Commission claims. Even if this cloud of constitutional doubt were removed -- for instance, by the adoption of a truly race- and gender-neutral plan such as BEDA's -- the statutory authority for the rules, in so far as it is built on the public interest standard and section 309(j), is quite vulnerable. In the end, I cannot support these regulations.

STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

Re: Equal Employment Opportunity Rules and Policies (MM 98-204, 96-16)

One of the primary foundations of our broadcasting policy is promoting a diversity of viewpoints.[1] Broadcasting, and especially television, is still the means by which most Americans get their news and information. And children, whose values and self-image are still being formed, spend far more time with television than with any other medium.[2] It is simply unconscionable that a societal force of such reach and impact not be open to, and reflective of, all segments of the community.

Some question the link between EEO rules and diversity of programming. I do not. While not all minorities or all women

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[1] *See, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990) ("Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission"); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("It has long been a basic tenet of national communications policy" that "the *widest* dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"), quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945); Communications Act, Section 257 (noting that one of the "policies and purposes" of the Communications Act favors a "diversity of media voices").

[2] Kaiser Family Foundation Report (1999) (finding that, on average, children watch two hours and forty-six minutes of television a day, compared to 48 minutes spent listening to CD's or tapes, the second most popular media activity).

share the same viewpoint, I believe that a broadcast industry that includes minorities and women would more likely air diverse viewpoints than a homogeneous workforce. Congress spoke to this issue in enacting the 1992 Cable Act:

> The Committee believes now, as it did in 1984, that increased equal employment opportunities (EEO) for women and minorities, particularly in decision-making and managerial positions, '... is a crucial means of assuring that program service will be responsible to a public consisting of a diverse array of population groups.'[3]

Similarly, the Supreme Court has affirmed that the Commission's regulation of the employment practices of its licensees "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."[4]

I support this item, not because it goes as far as perhaps I would like, but because the bulk of it goes as far as I think we should in the current legal landscape. I pray that it will be

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[3] H.R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992), quoting, H.R. Rep. No. 934, 98th Cong., 2d Sess. 85 (1984). Accord H.R. Rep. No. 628, 102d Cong., 2d Sess. 114 (1992):

> The Courts and the Commission have consistently recognized the increasing amount of programming designed to address the needs and interests of minorities and women is fundamentally related to the number of minority and women employees in the upper-level positions within media companies. In addition, the Committee recognizes that a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future television broadcasting ownership opportunities.

[4] *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

enough to create the kind of diversity on the public airwaves that Americans expect and deserve.

There are parts of today's Order that give me hope. One particularly ingenious provision is the "opt in" notification rule under Option A. Under this rule, minority and women's organizations, community groups and others can request that they be notified of any job openings that occur. This is a clearly race-neutral mechanism that could prove effective in ensuring that certain segments of the community are effectively notified of job openings.

Of course, getting the word out is not the same as getting a foot in the door. The Option A framework rests on the assumption that equal information will produce equal opportunity. We need to watch closely to see if this turns out to be true. And we need to continue working on studies that could justify a more race-conscious approach if today's assumptions prove too sanguine.

One area in which I would have gone further is Option B, where I agree with Chairman Kennard that we should have required the tracking of interviewee data, and not merely applicant data. Interviewee data is clearly superior to applicant data in measuring whether a broadcaster's outreach efforts are effective in reaching qualified applicants from all segments of the community. I am disappointed that a majority of the Commission did not agree. I therefore dissent from this part of the Order.

APPENDIX E

Relevant Provisions of the Cable Communications Policy Act of 1984, Pub L. No. 98-549, 98 Stat. 2779–2780, 2794, 2797–2800 (1984).

An Act

To amend the Communications Act of 1934 to provide a national policy regarding cable television.

* * *

SECTION 1. (a) This Act may be cited as the "Cable Communications Policy Act of 1984".

* * *

SEC. 2. The Communications Act of 1934 is amended by inserting after title V the following new title:

"TITLE VI—CABLE COMMUNICATIONS

* * *

"PART IV—MISCELLANEOUS PROVISIONS

* * *

"EQUAL EMPLOYMENT OPPORTUNITY

"SEC. 634. (a) This section shall apply to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system.

"(b) Equal opportunity in employment shall be afforded by each entity specified in subsection (a), and no person shall be discriminated against in employment by such entity because of race, color, religion, national origin, age, or sex.

"(c) Any entity specified in subsection (a) shall establish, maintain, and execute a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of its employment policies and practices. Under the terms of its program, each such entity shall --

"(1) define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

"(2) inform its employees and recognized employee organizations of the equal employment opportunity policy and program and enlist their cooperation;

"(3) communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, age, or sex, and solicit their recruitment assistance on a continuing basis;

"(4) conduct a continuing program to exclude every form of prejudice or discrimination based on race, color, religion, national origin, age, or sex, from its personnel policies and practices and working conditions; and

"(5) conduct a continuing review of job structure and employment practices and adopt positive recruitment, training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all its organizational units, occupations, and levels of responsibility.

"(d)(1) Not later than 270 days after the effective date of this section, and after notice and opportunity for hearing, the Commission shall prescribe rules to carry out this section.

"(2) Such rules shall specify the terms under which an entity specified in subsection (a) shall, to the extent possible

"(A) disseminate its equal opportunity program to job applicants, employees, and those with whom it regularly does business;

"(B) use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever jobs are available in its operation;

"(C) evaluate its employment profile and job turnover against the availability of minorities and women in its franchise area;

"(D) undertake to offer promotions of minorities and women to positions of greater responsibility;

"(E) encourage minority and female entrepreneurs to conduct business with all parts of its operation; and

"(F) analyze the results of its efforts to recruit, hire, promote, and use the services of minorities and women and explain any difficulties encountered in implementing its equal employment opportunity program.

"(3) Such rules also shall require an entity specified in subsection (a) with more than 5 full-time employees to file with the Commission an annual statistical report identifying by race and sex the number of employees in each of the following full-time and part-time job categories:

"(A) officials and managers;

"(B) professionals;

"(C) technicians;

"(D) sales persons;

"(E) office and clerical personnel;

"(F) skilled craft persons;

"(G) semiskilled operatives;

"(H) unskilled laborers; and

"(I) service workers.

The report shall include the number of minorities and women in the relevant labor market for each of the above categories. The statistical report shall be available to the public at the central office and at every location where more than 5 full-time employees are regularly assigned to work.

"(4) The Commission may amend such rules from time to time to the extent necessary to carry out the provisions of this section. Any such amendment shall be made after notice and opportunity for comment.

"(e)(1) On an annual basis, the Commission shall certify each entity described in subsection (a) as in compliance with this section if, on the basis of information in the possession of the Commission, including the report filed pursuant to subsection (d)(3), such entity was in compliance, during the annual period involved, with the requirements of subsections (b), (c), and (d).

"(2) The Commission shall, periodically but not less frequently than every five years, investigate the employment practices of each entity described in subsection (a), in the aggregate, as well as in individual job categories, and determine whether such entity is in compliance with the requirements of subsections (b), (c), and (d), including whether such entity's employment practices deny or abridge women and minorities equal employment opportunities. As part of such investigation, the Commission shall review whether the entity's reports filed pursuant to subsection (d)(3) accurately reflect employee responsibilities in the reported job classifications.

"(f)(1) If the Commission finds after notice and hearing that the entity involved has willfully or repeatedly without good

cause failed to comply with the requirements of this section, such failure shall constitute a substantial failure to comply with this title. The failure to obtain certification under subsection (e) shall not itself constitute the basis for a determination of substantial failure to comply with this title. For purposes of this paragraph, the term 'repeatedly', when used with respect to failures to comply, refers to 3 or more failures during any 7-year period.

"(2) Any person who is determined by the Commission, through an investigation pursuant to subsection (e) or otherwise, to have failed to meet or failed to make best efforts to meet the requirements of this section, or rules under this section, shall be liable to the United States for a forfeiture penalty of $200 for each violation. Each day of a continuing violation shall constitute a separate offense. Any entity defined in subsection (a) shall not be liable for more than 180 days of forfeitures which accrued prior to notification by the Commission of a potential violation. Nothing in this paragraph shall limit the forfeiture imposed on any person as a result of any violation that continues subsequent to such notification. In addition, any person liable for such penalty may also have any license under this Act for cable auxiliary relay service suspended until the Commission determines that the failure involved has been corrected. Whoever knowingly makes any false statement or submits documentation which he knows to be false, pursuant to an application for certification under this section shall be in violation of this section.

"(3) The provisions of paragraphs (3) and (4), and the last 2 sentences of paragraph (2), of section 503(b) shall apply to forfeitures under this subsection.

"(4) The Commission shall provide for notice to the public and appropriate franchising authorities of any penalty imposed under this section.

"(g) Employees or applicants for employment who believe they have been discriminated against in violation of the requirements of this section, or rules under this section, or any other interested person, may file a complaint with the Commission. A complaint by any such person shall be in writing, and shall be signed and sworn to by that person. The regulations under subsection (d)(1) shall specify a program, under authorities otherwise available to the Commission, for the investigation of complaints and violations, and for the enforcement of this section.

"(h)(1) For purposes of this section, the term 'cable operator' includes any operator of any satellite master antenna television system, including a system described in section 602(6)(A).

"(2) Such term does not include any operator of a system which, in the aggregate, serves fewer than 50 subscribers.

"(3) In any case in which a cable operator is the owner of a multiple unit dwelling, the requirements of this section shall only apply to such cable operator with respect to its employees who are primarily engaged in cable telecommunications.

"(i)(1) Nothing in this section shall affect the authority of any State or any franchising authority --

"(A) to establish or enforce any requirement which is consistent with the requirements of this section, including any requirement which affords equal employment opportunity protection for employees;

"(B) to establish or enforce any provision requiring or encouraging any cable operator to conduct business with enterprises which are owned or controlled by members of minority groups (as defined in section 309(i)(3)(C)(ii)) or which have their principal operations located within the community served by the cable operator; or

"(C) to enforce any requirement of a franchise in effect on the effective date of this title.

"(2) The remedies and enforcement provisions of this section are in addition to, and not in lieu of, those available under this or any other law.

"(3) The provisions of this section shall apply to any cable operator, whether operating pursuant to a franchise granted before, on, or after the date of the enactment of this section."

APPENDIX F

Relevant Provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub L. No. 102-385, 106 Stat. 1460, 1498–1499 (1992).

An Act

To amend the Communications Act of 1934 to provide increased consumer protection and to promote increased competition in the cable television and related markets, and for other purposes.

* * *

SECTION 1. SHORT TITLE.

This Act may be cited as the "Cable Television Consumer Protection and Competition Act of 1992".

* * *

SEC. 22. EQUAL EMPLOYMENT OPPORTUNITY.

(a) FINDINGS.—The Congress finds and declares that—

(1) despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries;

(2) increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media; and

(3) rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.

(b) STANDARDS.—Section 634(d)(1) of the Communications Act of 1934 (47 U.S.C. 554(d)(1)) is amended to read as follows:

"(d)(1) Not later than 270 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, and after notice and opportunity for hearing, the Commission shall prescribe revisions in the rules under this section in order to implement the amendments made to this section by such Act. Such revisions shall be designed to promote equality of employment opportunities for females and minorities in each of the job categories itemized in paragraph (3).".

(c) CONTENTS OF ANNUAL STATISTICAL REPORTS.—Section 634(d)(3) of the Communications Act of 1934 (47 U.S.C. 554(d)(3)) is amended to read as follows:

"(3)(A) Such rules also shall require an entity specified in subsection (a) with more than 5 full-time employees to file with the Commission an annual statistical report identifying by race, sex, and job title the number of employees in each of the following full-time and part-time job categories:

"(i) Corporate officers.

"(ii) General Manager.

"(iii) Chief Technician.

"(iv) Comptroller.

"(v) General Sales Manager.

"(vi) Production Manager.

"(vii) Managers.

"(viii) Professionals.

"(ix) Technicians.

"(x) Sales Personnel.

"(xi) Office and Clerical Personnel.

"(xii) Skilled Craftspersons.

"(xiii) Semiskilled Operatives.

"(xiv) Unskilled Laborers.

"(xv) Service Workers.

"(B) The report required by subparagraph (A) shall be made on separate forms, provided by the Commission, for full-time and part-time employees. The Commission's rules shall sufficiently define the job categories listed in clauses (i) through (vi) of such subparagraph so as to ensure that only employees who are principal decisionmakers and who have supervisory authority are reported for such categories. The Commission shall adopt rules that define the job categories listed in clauses (vii) through (xv) in a manner that is consistent with the Commission policies in effect on June 1, 1990. The Commission shall prescribe the method by which entities shall be required to compute and report the number of minorities and women in the job categories listed in clauses (i) through (x) and the number of minorities and women in the job categories listed in clauses (i) through (xv) in proportion to the total number of qualified minorities and women in the relevant labor market. The report shall include information on hiring, promotion, and recruitment practices necessary for the Commission to evaluate the efforts of entities to comply with the provisions of paragraph (2) of this subsection. The report shall be available for public inspection at the entity's central location and at every location where 5 or more full-time employees are regularly assigned to work. Nothing in

this subsection shall be construed as prohibiting the Commission from collecting or continuing to collect statistical or other employment information in a manner that it deems appropriate to carry out this section.".

(d) PENALTIES.—Section 634(f)(2) of such Act (47 U.S.C. 554(f)(2)) is amended by striking "$ 200" and inserting "$ 500".

(e) APPLICATION OF REQUIREMENTS.—Section 634(h)(1) of such Act (47 U.S.C. 554(h)(1)) is amended by inserting before the period the following: "and any multichannel video programming distributor".

(f) BROADCASTING EQUAL EMPLOYMENT OPPORTUNITY.—Part I of title III of the Communications Act of 1934 is amended by inserting after section 333 (47 U.S.C. 333) the following new section:

"SEC. 334. LIMITATION ON REVISION OF EQUAL EMPLOYMENT OPPORTUNITY REGULATIONS.

"(a) LIMITATION.—Except as specifically provided in this section, the Commission shall not revise --

"(1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or

"(2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.

"(b) M IDTERM REVIEW.—The Commission shall revise the regulations described in subsection (a) to require a midterm review of television broadcast station licensees' employment practices and to require the Commission to inform such licensees of necessary improvements in

recruitment practices identified as a consequence of such review.

"(c) AUTHORITY TO MAKE TECHNICAL REVISIONS.—The Commission may revise the regulations described in subsection (a) to make nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization.".

(g) STUDY AND REPORT REQUIRED.—Not later than 2 years after the date of enactment of this Act, the Commission shall submit to the Congress a report pursuant to a proceeding to review and obtain public comment on the effect and operation of the amendments made by this section. In conducting such review, the Commission shall consider the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority. The Commission shall forward to the Congress such legislative recommendations to improve equal employment opportunity in the broadcasting and cable industries as it deems necessary.

APPENDIX G

47 C.F.R. § 73.2080 (1992)

(a) General EEO policy. Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV, or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex.

(b) EEO program. Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice. Under the terms of its program, a station shall:

(1) Define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

(2) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation;

(3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, or sex, and solicit their recruitment assistance on a continuing basis;

(4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based

upon race, color, religion, national origin, or sex from its personnel policies and practices and working conditions; and

(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.

(c) EEO program requirements. A broadcast station's equal employment opportunity program should reasonably address itself to the specific areas set forth below, to the extent possible, and to the extent that they are appropriate in terms of the station's size, location, etc.:

(1) Disseminate its equal opportunity program to job applicants and employees. For example, this requirement may be met by:

(i) Posting notices in the station's office and other places of employment, informing employees, and applicants for employment, of their equal employment opportunity rights. Where it is appropriate, such equal employment opportunity notices should be posted in languages other than English;

(ii) Placing a notice in bold type on the employment application informing prospective employees that discrimination because of race, color, religion, national origin, or sex is prohibited;

(iii) Seeking the cooperation of labor unions, if represented at the station, in the implementation of its EEO program and the inclusion of non-discrimination provisions in union contracts;

(iv) Utilizing media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one sex over another and that can be reasonably expected to reach minorities and women.

(2) Use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever job vacancies are available in its operation. For example, this requirement may be met by:

(i) Placing employment advertisements in media that have significant circulation among minorities residing and/or working in the recruiting area;

(ii) Recruiting through schools and colleges, including those located in the station's local area, with significant minority-group enrollments;

(iii) Contacting, both orally and in writing, minority and human relations organizations, leaders, and spokesmen and spokeswomen to encourage referral of qualified minority or female applicants;

(iv) Encouraging current employees to refer minority or female applicants;

(v) Making known to recruitment sources in the employer's immediate area that qualified minority members and females are being sought for consideration whenever you hire and that all candidates will be considered on a nondiscriminatory basis.

(3) Evaluate its employment profile and job turnover against the availability of minorities and women in its recruitment area. For example, this requirement may be met by:

(i) Comparing the composition of the relevant labor area with composition of the station's workforce;

(ii) Where there is underrepresentation of either minorities and/or women, examining the company's personnel policies and practices to assure that they do not inadvertently screen out any group and take appropriate action where necessary. Data on representation of minorities and women in the available labor force are generally available on a metropolitan statistical area (MSA) or county basis.

(4) Undertake to offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility. For example, this requirement may be met by:

(i) Instructing those who make decisions on placement and promotion that qualified minority employees and females are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed;

(ii) Giving qualified minority and female employees equal opportunity for positions which lead to higher positions. Inquiring as to the interest and skills of all lower paid employees with respect to any of the higher paid positions.

(5) Analyze its efforts to recruit, hire, and promote minorities and women and address any difficulties encountered in implementing its equal employment opportunity program. For example, this requirement may be met by:

(i) Avoiding use of selection techniques or tests that have the effect of discriminating against qualified minority groups or females;

(ii) Reviewing seniority practices to ensure that such practices are nondiscriminatory;

(iii) Examining rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race or sex discrimination.

APPENDIX H

47 U.S.C. § 554

§ 554. Equal employment opportunity

(a) Entities within scope of coverage. This section shall apply to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system.

(b) Discrimination prohibited. Equal opportunity in employment shall be afforded by each entity specified in subsection (a), and no person shall be discriminated against in employment by such entity because of race, color, religion, national origin, age, or sex.

(c) Equal opportunity programs; establishment; maintenance; execution; terms. Any entity specified in subsection (a) shall establish, maintain, and execute a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of its employment policies and practices. Under the terms of its program, each such entity shall--

> (1) define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;
>
> (2) inform its employees and recognized employee organizations of the equal employment opportunity policy and program and enlist their cooperation;
>
> (3) communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race,

color, religion, national origin, age, or sex, and solicit their recruitment assistance on a continuing basis;

(4) conduct a continuing program to exclude every form of prejudice or discrimination based on race, color, religion, national origin, age, or sex, from its personnel policies and practices and working conditions; and

(5) conduct a continuing review of job structure and employment practices and adopt positive recruitment, training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all its organizational units, occupations, and levels of responsibility.

(d) Revision of rules; required provisions; annual statistical report; notice and comment on amendments.

(1) Not later than 270 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, and after notice and opportunity for hearing, the Commission shall prescribe revisions in the rules under this section in order to implement the amendments made to this section by such Act. Such revisions shall be designed to promote equality of employment opportunities for females and minorities in each of the job categories itemized in paragraph (3).

(2) Such rules shall specify the terms under which an entity specified in subsection (a) shall, to the extent possible–

(A) disseminate its equal opportunity program to job applicants, employees, and those with whom it regularly does business;

(B) use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants,

to supply referrals whenever jobs are available in its operation;

(C) evaluate its employment profile and job turnover against the availability of minorities and women in its franchise area;

(D) undertake to offer promotions of minorities and women to positions of greater responsibility;

(E) encourage minority and female entrepreneurs to conduct business with all parts of its operation; and

(F) analyze the results of its efforts to recruit, hire, promote, and use the services of minorities and women and explain any difficulties encountered in implementing its equal employment opportunity program.

(3) (A) Such rules also shall require an entity specified in subsection (a) with more than 5 full-time employees to file with the Commission an annual statistical report identifying by race, sex, and job title the number of employees in each of the following full-time and part-time job categories:

(i) Corporate officers.

(ii) General Manager.

(iii) Chief Technician.

(iv) Comptroller.

(v) General Sales Manager.

(vi) Production Manager.

(vii) Managers.

(viii) Professionals.

(ix) Technicians.

(x) Sales Personnel.

(xi) Office and Clerical Personnel.

(xii) Skilled Craftspersons.

(xiii) Semiskilled Operatives.

(xiv) Unskilled Laborers.

(xv) Service Workers.

(B) The report required by subparagraph (A) shall be made on separate forms, provided by the Commission, for full-time and part-time employees. The Commission's rules shall sufficiently define the job categories listed in clauses (i) through (vi) of such subparagraph so as to ensure that only employees who are principal decisionmakers and who have supervisory authority are reported for such categories. The Commission shall adopt rules that define the job categories listed in clauses (vii) through (xv) in a manner that is consistent with the Commission policies in effect on June 1, 1990. The Commission shall prescribe the method by which entities shall be required to compute and report the number of minorities and women in the job categories listed in clauses (i) through (x) and the number of minorities and women in the job categories listed in clauses (i) through (xv) in proportion to the total number of qualified minorities and women in the relevant labor market. The report shall include information on hiring, promotion, and recruitment practices necessary for the Commission to evaluate the efforts of entities to comply with the provisions of paragraph (2) of this subsection. The report shall be available for public inspection at the entity's central location and at every location where 5 or more full-time employees are regularly assigned to work. Nothing in this subsection shall be

construed as prohibiting the Commission from collecting or continuing to collect statistical or other employment information in a manner that it deems appropriate to carry out this section.

(4) The Commission may amend such rules from time to time to the extent necessary to carry out the provisions of this section. Any such amendment shall be made after notice and opportunity for comment.

(e) Annual certification of compliance; periodic investigation of employment practices.

(1) On an annual basis, the Commission shall certify each entity described in subsection (a) as in compliance with this section if, on the basis of information in the possession of the Commission, including the report filed pursuant to subsection (d)(3), such entity was in compliance, during the annual period involved, with the requirements of subsections (b), (c), and (d).

(2) The Commission shall, periodically, but not less frequently than every five years, investigate the employment practices of each entity described in subsection (a), in the aggregate, as well as in individual job categories, and determine whether such entity is in compliance with the requirements of subsections (b), (c), and (d), including whether such entity's employment practices deny or abridge women and minorities equal employment opportunities. As part of such investigation, the Commission shall review whether the entity's reports filed pursuant to subsection (d)(3) accurately reflect employee responsibilities in the reported job classifications.

(f) Substantial failure to comply; penalties; notice to public and franchising authorities.

(1) If the Commission finds after notice and hearing that the entity involved has willfully or repeatedly without

good cause failed to comply with the requirements of this section, such failure shall constitute a substantial failure to comply with this title. The failure to obtain certain certification under subsection (e) shall not itself constitute the basis for a determination of substantial failure to comply with this title. For purposes of this paragraph, the term "repeatedly", when used with respect to failures to comply, refers to 3 or more failures during any 7-year period.

(2) Any person who is determined by the Commission, through an investigation pursuant to subsection (e) or otherwise, to have failed to meet or failed to make best efforts to meet the requirements of this section, or rules under this section, shall be liable to the United States for a forfeiture penalty of $ 500 for each violation. Each day of a continuing violation shall constitute a separate offense. Any entity defined in subsection (a) shall not be liable for more than 180 days of forfeitures which accrued prior to notification by the Commission of a potential violation. Nothing in this paragraph shall limit the forfeiture imposed on any person as a result of any violation that continues subsequent to such notification. In addition, any person liable for such penalty may also have any license under this Act for cable auxiliary relay service suspended until the Commission determines that the failure involved has been corrected. Whoever knowingly makes any false statement or submits documentation which he knows to be false, pursuant to an application for certification under this section shall be in violation of this section.

(3) The provisions of paragraphs (3) and (4), and the last 2 sentences of paragraph (2), of section 503(b) shall apply to forfeitures under this subsection.

(4) The Commission shall provide for notice to the public and appropriate franchising authorities of any penalty imposed under this section.

(g) Discrimination complaints; investigation; enforcement. Employees or applicants for employment who believe they have been discriminated against in violation of the requirements of this section, or rules under this section, or any other interested person, may file a complaint with the Commission. A complaint by any such person shall be in writing, and shall be signed and sworn to by that person. The regulations under subsection (d)(1) shall specify a program, under authorities otherwise available to the Commission, for the investigation of complaints and violations, and for the enforcement of this section.

(h) Definition of "cable operator"; owners of multiple unit dwellings.

(1) For purposes of this section, the term "cable operator" includes any operator of any satellite master antenna television system, including a system described in section 602(7)(A) and any multichannel video programming distributor.

(2) Such term does not include any operator of a system which, in the aggregate, serves fewer than 50 subscribers.

(3) In any case in which a cable operator is the owner of a multiple unit dwelling, the requirements of this section shall only apply to such cable operator, with respect to its employees who are primarily engaged in cable telecommunications.

(i) Regulatory powers of States and franchising authorities; nonexclusive nature of remedies and enforcement provisions; covered franchises.

(1) Nothing in this section shall affect the authority of any State or any franchising authority--

(A) to establish or enforce any requirement which is consistent with the requirements of this section, including any requirement which affords equal employment opportunity protection for employees;

(B) to establish or enforce any provision requiring or encouraging any cable operator to conduct business with enterprises which are owned or controlled by members of minority groups (as defined in section 309(I)(3)(C)(ii) or which have their principal operations located within the community served by the cable operator; or

(C) to enforce any requirement of a franchise in effect on the effective date of this title.

(2) The remedies and enforcement provisions of this section are in addition to, and not in lieu of, those available under this or any other law.

(3) the provisions of this section shall apply to any cable operator, whether operating pursuant to a franchise granted before, on, or after the date of the enactment of this section [Oct. 30, 1984].

Supreme Court, U.S.
FILED
DEC 26 2001

Nos. 01-639 and 01-662

In the Supreme Court of the United States

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, ET AL., PETITIONERS

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET AL.

OFFICE OF COMMUNICATION, INC., UNITED CHURCH OF CHRIST, PETITIONER

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in declaring "Option B"—an alternate way of complying with the Federal Communications Commission's equal employment opportunity regulations—unconstitutional on its face, based on the theory that broadcasters selecting that option would feel pressure to adopt recruiting practices that could deprive potential job candidates of information concerning job opportunities based on their race.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 236 F.3d 13. The opinion of the court of appeals on denial of rehearing (Pet. App. 20a) is reported at 253 F.3d 732.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2001, and rehearing was denied on June 19, 2001. On September 12 and 13, 2001, the Chief Justice

extended the time within which to file the petitions for a writ of certiorari to and including October 17, 2001, and the petitions were filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the validity of certain equal employment opportunity (EEO) rules promulgated by the Federal Communications Commission (FCC or Commission) in February of 2000. Those rules are designed to prevent discriminatory hiring practices by broadcast licensees, and to eliminate recruitment practices that operate to exclude or disadvantage potential job applicants on the basis of race or gender.

1. The FCC first began administering EEO responsibilities with respect to its broadcast licensees in 1969, when it adopted rules that prohibited licensees from discriminating on the basis of race, and that required licensees to establish, maintain, and carry out continuing programs to assure equal employment opportunity in every aspect of their employment policies and practices. See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240 (1969). Over the years, the FCC has adopted additional rules to prevent discrimination in recruitment, selection and hiring, placement and promotion, and has extended those rules to prevent discrimination on the basis of gender. See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 F.C.C.2d 430 (1970); *Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340 and 342*, 32 F.C.C.2d 708 (1971).

The FCC's authority to promulgate EEO regulations derives from various federal statutes that prohibit FCC

licensees from discriminating in their employment practices and require them to adopt "positive recruitment, [job] training" and other measures to ensure "equality of opportunity." 47 U.S.C. 554(b) and (c)(5); 47 U.S.C. 334(a)(1). In 1984, Congress enacted EEO requirements applicable to cable television systems. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 634, 98 Stat. 2779 (1984) (Pet. App. 269a). That statute was, according to its legislative history, designed to "codif[y] and strengthen[] the Commission's existing equal employment opportunity regulations." H.R. Rep. No. 934, 98th Cong., 2d Sess. 86 (1984). In 1992, Congress codified the FCC's EEO requirements for broadcast television licensees, and extended EEO requirements to all other multichannel video programming distributors. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1498 (1992) (1992 Cable Act) (Pet. App. 276a). Congress found that, notwithstanding "regulations governing equal employment opportunity, women and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries," and that "rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination." 1992 Cable Act, § 22(a)(1), 106 Stat. 1498 (Pet. App. 276a-277a). Congress also declared that the FCC "shall not revise" its equal employment opportunity rules applicable to television broadcast station licensees. 1992 Cable Act, § 22(f), 106 Stat. 1499 (codified as 47 U.S.C. 334(a)) (Pet. App. 279a-280a).

2. In 1997, the FCC determined that the hiring practices of one of its licensees, Lutheran Church-Missouri Synod, may have violated the Commission's EEO

regulations relating to community outreach. Lutheran Church sought review of the FCC's decision and challenged the constitutionality of the FCC's EEO outreach rules. In *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998), the court of appeals determined that the FCC's use of numeric processing guidelines and numeric measurements for analyzing racial and gender employment data "extend[ed] beyond outreach efforts" and "create[d] a strong incentive [for broadcasters] to meet * * * numerical goals." *Id.* at 353, 356. The court held that the "entire scheme" of the EEO outreach rules was "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation" based on the racial composition of the surrounding community. *Id.* at 351-352. The court held that the EEO rules were unconstitutional because they were not narrowly tailored to advance a compelling governmental interest. *Id.* at 350-356.[1]

On February 2, 2000, the FCC released revised EEO rules in response to the court of appeals' *Lutheran Church* decision. See Report and Order, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 2329 (2000) (Pet. App. 49a) (*EEO Report and Order*); 47 C.F.R. 73.2080 (Pet. App. 37a-48a). Those rules focused on recruitment efforts, rather than hiring

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[1] The court denied a petition for rehearing. *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 487 (D.C. Cir. 1998). The panel stated that the FCC's use of "numerical norms based on proportional representation * * * is the aspect of the Commission's rule that makes it impossible for us to apply any standard of review other than strict scrutiny." *Id.* at 492. The full court declined to rehear the case en banc, with three judges dissenting. *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 494 (D.C. Cir. 1998).

decisions, and eliminated the use of numerical norms that the court of appeals disfavored. See *EEO Report and Order*, 15 FCC Rcd at 2412, ¶ 211 n.336 (Pet. App. 207a n.336). Instead, "[u]nder the new rule," licensees would "not be required to compare the racial composition of their employment profile with the racial composition of the labor force in their communities, and the Commission would not make that comparison in processing renewal applications." *Id.* at 2412, ¶ 211 (Pet. App. 207a). Because of that change, the FCC concluded that "the new rules would not indirectly pressure employers to make race-based hiring decisions contrary to the *Lutheran Church* decision." *Ibid.*

The revised rules provided new methods for licensees to document recruitment efforts, and established two ways for broadcasters to achieve compliance. 47 C.F.R. 73.2080(c)(1), (c)(2) and (d) (Pet. App. 38a-40a, 43a-44a). See also *EEO Report and Order*, 15 FCC Rcd at 2363-2365, ¶¶ 77-78 (Pet. App. 113a-116a). In all circumstances, licensees were required to disseminate widely information concerning each full-time job vacancy. *EEO Report and Order*, 15 FCC Rcd 2364, ¶ 78 (Pet. App. 113a). In addition, licensees were required to engage in outreach activities, consistent with one of two alternate approaches, known as Option A (47 C.F.R. 73.2080(c)), and Option B (47 C.F.R. 73.2080(d)). See *EEO Report and Order*, 15 FCC Rcd 2364-2365, ¶ 78 (Pet. App. 114a-116a). Under Option A, licensees could fully comply without considering or documenting race or gender in any recruitment activity. Instead, Option A required licensees to recruit for every job vacancy by providing notification of the vacancy to any recruitment organization that requests such notice, 47 C.F.R. 73.2080(c)(1)(ii) (Pet. App. 39a), and to participate in two to four additional recruitment activities every two

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years (depending on the number of full-time employees at the station), 47 C.F.R. 73.2080(c)(2) (Pet. App. 39a-40a). The additional recruitment activities could be selected from a non-exclusive menu of options that included participation in job fairs and job banks, establishment of scholarship and in-house training programs, and participation in community events related to employment opportunities in the industry. *Ibid.* See also *EEO Report and Order*, 15 FCC Rcd at 2372-2374, ¶¶ 99-103 (Pet. App. 129a-133a).[2] In addition, licensees could choose, instead of the specifically listed options, to conduct "other activities * * * reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to candidates who might otherwise be unaware of such opportunities." 47 C.F.R. 73.2080(c)(2)(xiii) (Pet. App. 40a). See also *Report and Order*, 15 FCC Rcd at 2374, ¶ 102 (Pet. App. 132a). Licensees selecting Option A were required to maintain records documenting compliance, but did not need to report racial data in so doing. 47 C.F.R. 73.2080(c)(5) (Pet. App. 41a-42a).

At the request of several licensees, the Commission also gave broadcasters an alternative—Option B—under which they could forgo the additional recruitment measures set out in Option A and design their own outreach programs instead. See 47 C.F.R. 73.2080(d) (Pet. App. 43a). See also *EEO Report and*

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[2] Only two of the thirteen listed recruitment measures involved special attention for women and minorities. Those two measures provided that a licensee may "co-sponsor[] at least one job fair with" or list "each upper-level category opening in a job bank or newsletter of" entities whose "membership includes a substantial participation of women and minorities." 47 C.F.R. 73.2080(c)(2)(iii) and (xii).

Order, 15 FCC Rcd at 2365, 2374, ¶¶ 78, 104 (Pet. App. 115a-116a, 133a-134a). Licensees electing Option B were required to demonstrate that their outreach programs result in wide dissemination of information on job vacancies and to maintain "data reflecting the recruitment source, gender, and racial and/or ethnic status of applicants for each full-time job vacancy filled by the station employment unit." See 47 C.F.R. 73.2080(d)(1) (Pet. App. 43a). In addition, licensees choosing Option B were required to report "data reflecting, for each recruitment source utilized for any full-time vacancy during the preceding year, the total number of applicants generated by that source, the number of applicants who were female, and the number of applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated." 47 C.F.R. 73.2080(d)(2) (Pet. App. 43a-44a).

With respect to the data collection component of Option B, the FCC stated that "there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force." *EEO Report and Order*, 15 FCC Rcd at 2378, ¶ 120 (Pet. App. 142a). "The only purpose of the data collection is to give the broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community." *Id.* at 2378-2379, ¶ 120 (Pet. App. 143a). The FCC also stated that Option B was designed merely to give broadcasters an opportunity to design their own program and that it was not necessary to the FCC's EEO program; if Option B were invalidated, the FCC noted, it should be severed from

the remainder of the regulation. See Memorandum Opinion and Order, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 22,548, 22,555, ¶ 22 & n.19 (2000).

3. Following the FCC's issuance of its revised EEO rules, various parties, including the Office of Communication, Inc., United Church of Christ (UCC) (petitioner in No. 01-662), sought review in the Court of Appeals for the District of Columbia Circuit. The Minority Media and Telecommunications Council (MMTC) and National Organization for Women (NOW) (petitioners in No. 01-639) intervened to defend the FCC's EEO rules.

Following briefing and argument, the court of appeals granted the petitions for review and vacated the FCC's rules. The court first held Option A to be constitutional. Pet. App. 9a. Under Option A, the court pointed out, a licensee did not need to report the race or gender of job applicants or interviewees. Instead, the applicant could select from a list of 13 special recruiting devices. "Because * * * licensees remain free under Option A to select recruitment measures that do not place a special emphasis upon the presence of women and minorities in the target audience," the court concluded, "we do not believe the Broadcasters are meaningfully pressured under Option A to recruit women and minorities." Pet. App. 9a-10a.

The court of appeals, however, held Option B to be unconstitutional. The court first found that Option B put "pressure [on licensees] to focus recruiting efforts upon women and minorities." Pet. App. 10a. The court stated that, under Option B, licensees were required to report the race and gender of each applicant so that the FCC could determine whether a licensee's recruitment

efforts have reached the "entire community." *Ibid.* The court stated that the FCC would "investigate the broadcaster's recruitment efforts" "[i]f a licensee reports 'few or no' women and minorities in its applicant pool." *Ibid.* The potential for "[i]nvestigation by the licensing authority is a powerful threat," the court stated, and is "almost guaranteed" to make licensees "focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications." *Id.* at 11a, 11a-12a. The FCC's use of job applications generated by outreach to gauge effectiveness, instead of the nature of the outreach itself, the court also stated, "is evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them." *Id.* at 11a.

The court also found that the "pressure" to generate minority and female applicants allegedly created by Option B would result in disparate treatment of potential applicants based on race. Option B, the court stated, "compel[s] broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates." Pet. App. 13a-14a & n.***. The court hypothesized that, because of that redirection of resources, "some prospective non-minority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." *Id.* at 14a. The court therefore held that the FCC's program must be reviewed under the strict scrutiny standard applicable to racial classifications. *Ibid.*

The court concluded that Option B does not survive strict scrutiny because it is not narrowly tailored to the FCC's asserted interest in preventing discrimination.

Pet. App. 15a. The court reasoned that there is no basis for pressuring a broadcaster to recruit minorities absent a "predicate finding" that the particular broadcaster had discriminated or was likely to discriminate against minorities. *Id.* at 16a. The court also concluded that Option B's requirement that licensees document the race of each job applicant "is relevant to the prevention of discrimination only if the Commission assumes that minority groups will respond to non-discriminatory recruitment efforts in some predetermined ratio, such as in proportion to their percentage representation in the local workforce." *Ibid.* Such an assumption, the court observed, "stands in direct opposition to the guarantee of equal protection." *Ibid.* Thus, the court concluded that the data required under Option B "are not probative on the question of a licensee's efforts to achieve 'broad outreach,' much less narrowly tailored to further the Commission's stated goal of non-discrimination in the broadcast industry." *Id.* at 16a-17a.

Finally, the court held that the FCC's EEO rules had to be vacated in their entirety, because Option B is not severable from Option A. Pet. App. 17a-18a. The court agreed that the FCC "clearly intend[ed] that the regulation be treated as severable, to the extent possible." *Ibid.* But the court concluded that the FCC's EEO rules could not function sensibly without Option B. *Id.* at 17a-18a. The court observed that the FCC's intent was to give licensees flexibility by offering two means of complying, *id.* at 17a, and therefore concluded that eliminating one of those means "would undercut the whole structure of the rule" by giving licensees only a single option, *id.* at 17a-18a.

4. The court denied petitions for rehearing and rehearing en banc. Pet. App. 26a. On rehearing, the

panel issued a supplemental opinion to respond to the FCC's argument that Option B should have been severed from the rest of the FCC's EEO rules.[3] Although the Commission argued that its orders and briefs had made its preference for severance clear, the court again concluded that it was not appropriate to preserve Option A while severing Option B. *Id.* at 22a-24a. The FCC order under review, the court stated, "had two goals—ensuring broad outreach and affording flexibility." *Id.* at 24a. Because Option B had been provided to afford broadcasters flexibility, the court stated, it played "an integral part in the Commission's evaluation of the rule as a whole," and "the Commission never once considered the implications of promulgating an EEO rule without Option B." *Id.* at 25a. The court therefore held that leaving the Commission's EEO outreach rules in place shorn of Option B "without further consideration * * * would leave in force a rule that, in view of the Commission's own stated goals, would be arbitrary and capricious." *Id.* at 26a.

Judge Tatel, joined by two other judges, dissented from the denial of rehearing en banc. Pet. App. 27a-36a. Judge Tatel disagreed with the panel's conclusion that the Commission's EEO regulations are subject to strict scrutiny. Because this case involves a facial challenge to the FCC's regulations, Judge Tatel explained, the regulations must be upheld unless "no set of circumstances exists under which" the regulations "would be valid." Pet. App. 27a (quoting *United States* v. *Salerno*, 481 U.S. 739 (1987)). Here, he observed, the court had

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[3] Petitioners sought rehearing and rehearing en banc. The FCC and the United States sought panel rehearing on the court's decision not to sever Option B from the remainder of the FCC's EEO rules. See Pet. App. 21a n.1.

invalidated the FCC's regulation by speculating about hypothetical scenarios that might render the rule unconstitutional in application. *Ibid.* In particular, the court had hypothesized that the Commission would enforce the rule in a manner that pressures broadcasters into generating applicant pools with the same racial composition as the local community, even though the Commission had expressly declared that it would not do so. *Id.* at 27a-28a. See also *id.* at 30a-31a. And the court had hypothesized that requiring broader dissemination to reach "the entire community" would necessarily "reduce the number of white males receiving job information," a result that was hardly inevitable. *Id.* at 29a. See also *id.* at 31-32a. "Because there exist 'circumstances . . . under which' broadcasters can comply with Option B with no adverse effect on white males," Judge Tatel concluded, "the broadcasters' facial challenge should have failed." *Id.* at 29a. Instead, the broadcasters should have been left to bring an "as applied challenge when and if the Commission applies the rule in a discriminatory manner." *Ibid.*

Judge Tatel also concluded that the court should have severed Option B from the remainder of the FCC's EEO rules. Pet. App. 32a-36a. The agency, Judge Tatel emphasized, had intended for the two options to be severable, and "[a]gency intent has always been the touchstone of [the] inquiry into whether an invalid portion of a regulation is severable." *Id.* at 33a.

ARGUMENT

This case concerns the constitutionality of the equal employment opportunity (EEO) outreach rules promulgated by the Federal Communications Commission (FCC or Commission) in February 2000. See Report and Order, *Review of the Commission's Broadcast and*

Cable Equal Employment Opportunity Rules, 15 FCC Rcd 2329 (2000) (*EEO Report and Order*) (Pet. App. 49a). The court of appeals upheld the most important feature of those rules, reflected in Option A, as constitutional. However, the court also concluded that an alternative provided by those rules—Option B, which established an alternate method of complying with EEO outreach obligations—was subject to strict scrutiny and unconstitutional on its face. As a result, the court vacated the FCC's EEO outreach rules in their entirety and remanded the matter to the FCC for further consideration.

Although the court of appeals misapplied the standard for resolving facial constitutional challenges, and erred in its severance analysis, further review is not warranted. The FCC has contended throughout this litigation that it can satisfy its statutory EEO obligations through Option A alone. Although the court of appeals erroneously failed to sever (and thereby preserve) Option A when it struck down Option B, the proper remedy for that mistaken severance decision is for the FCC to promulgate new regulations that omit the provisions held unconstitutional by the court of appeals. The FCC has already noticed such replacement rules.

The court of appeals' decision, moreover, does not announce any broad principles of law; it merely misapplies settled standards to the particular facts of this case. Nor is it clear that the decision will have a significant impact in future cases. In fact, because the decision appears to rest on agency-specific concerns and factual assumptions that will not bind future panels—panels that will review different regulations, potentially issued by different agencies, in different circumstances, and on different factual records—it may prove to have

little effect beyond this case. Finally, the decision does not create a division in circuit authority. Accordingly, further review is not warranted.

1. As this Court has explained, a party bringing a facial challenge to the constitutionality of a statute or regulation bears a heavy burden. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). "The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* at 745. Instead, a statute or regulation is invalid on its face only when it is "apparent that" the statute or regulation "could *never* be applied in a valid manner." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984) (emphasis added).

In this case, the court of appeals held that one alternate method of complying with the FCC's EEO rules, known as Option B, was subject to strict scrutiny and unconstitutional on its face. In reaching that conclusion, the court of appeals in essence made factual findings regarding the manner in which the FCC would enforce the regulations and the effect that such enforcement would have on licensee behavior. First, the court found that the record-keeping requirements imposed by Option B—that licensees must report the race, gender, and source of referral for each applicant for employment—will pressure licensees to focus recruiting efforts on women and minorities in order to generate applications from those groups; that was true, the court stated, because the FCC would investigate licensees if the data showed significant disparities. Pet. App. 10a-12a (data collection and threat of investigation "almost guaranteed" to make licensees "focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the

licensee's job applications"). Second, the court found that such pressure would cause licensees to focus their "necessarily finite recruiting resources" on generating a larger percentage of minority applicants, and thus would divert resources from providing notice to nonminority applicants. *Id.* at 13a-14a. As a result, the court found, the Commission's regulations will deprive nonminority candidates of the opportunity to compete for openings on account of their race. *Id.* at 14a n. ***.

We agree with petitioners that speculation about how the FCC might enforce its regulations is not a proper basis for striking down those regulations on their face, particularly in the absence of any supportive record evidence. See MMTC/NOW Pet. (No. 01-639), at 16-21. The use of statistical imbalances as a means of identifying potentially discriminatory practices is well established, *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977); MMTC/NOW Pet. 22-23 (citing additional authorities), and many agencies collect such data to ensure compliance with nondiscrimination requirements. See, *e.g.*, 29 C.F.R. 1602.7 (EEOC regulations), and 41 C.F.R. 60-2.11 to 60-2.15 (Department of Labor regulations). Here, there is no basis for finding that the FCC would use such data and its enforcement powers in a manner that pressures licensees to achieve racial proportionality in recruiting. The FCC, after all, has specifically declared that "there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force," and has disavowed any intent of relying on statistical data in isolation. See *EEO Report and Order*, 15 FCC Rcd at 2378, ¶ 120 (Pet. App. 142a). "The only purpose of the data collection," the FCC explained, "is to give the broadcaster, the public, and the Commission *more information* by which to monitor the effec-

tiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community." *Id.* at 2378-2379, ¶ 120 (Pet. App. 143a) (emphasis added).[4]

Similarly, we agree with petitioners that the court of appeals should not have assumed that, by requiring licensees to reach out to the entire community, the FCC's rules would deprive one particular part of the community—nonminorities—of job-availability information they otherwise would have received. The distribution of information about job openings is not necessarily a zero-sum game in which providing the information to one group automatically results in the exclusion of others. To the contrary, some means of distributing notice (postings in the community, electronic notices, use of publications with broader circulation to all groups) may increase the reach of notice to all, particularly when compared to other (*e.g.*, informal and word-of-mouth) methods. See Pet. App. 29a (Tatel, J., dissenting from denial of rehearing en banc).

Of course, if the difficulties identified by the court of appeals in fact were to arise in a particular case, that might raise serious constitutional concerns and provide grounds for an as-applied challenge. But mere speculation about such hypothetical events is not a proper basis for striking down a regulation *on its face*. In that respect, the court of appeals misapplied settled

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[4] It is also hard see how the FCC's collection of data could be thought to *pressure* broadcasters to recruit minorities over nonminorities. After, all broadcasters remain subject to a nondiscrimination requirement. Broadcasters concerned about collecting and reporting data on the identity of applicants also could avoid collecting such data by selecting Option A, which has no data collection requirements, instead of Option B.

law governing the disposition of facial constitutional challenges.

2. The misapplication of settled law to a particular set of facts, however, is not the sort of matter that ordinarily warrants this Court's review. The court of appeals did not make any broad pronouncements regarding how facial challenges should be adjudicated. It did not hold that courts must or should make questionable factual assumptions about how a regulation will be applied. Nor did it hold that a regulation can be unconstitutional on its face even though it is capable of constitutional application. Instead, the court made the apparently case-specific error of relying on inappropriate factual assumptions in the context of this case.

Further review of that case-specific error is neither necessary nor appropriate. As an initial matter, the effect on the FCC's enforcement efforts is unlikely to be significant. To the contrary, the FCC has determined that it can meet its statutory EEO obligations even without the use of Option B. In the petition for panel rehearing below, the FCC called the court's attention to language in its orders making clear that it "did not view Option B as essential to achieving its goal of ensuring that broadcasters engage in broad outreach in recruiting new employees." FCC Petition for Rehearing at 3. The FCC explained that Option B had been "adopted at the request of broadcasters to provide them with additional flexibility," and that Option A would be more than adequate to permit the FCC to ensure that broadcasters broadly advertise job vacancies. *Ibid.* Although the court of appeals erroneously rejected the FCC's severance analysis, the clear remedy for that lies in the FCC's repromulgation of its rules without the optional provision held unconstitutional by the decision below. To that end, the FCC

recently announced its adoption of a Second Notice of Proposed Rule Making, in which the Commission proposes repromulgating Option A without Option B, together with certain other conforming changes. *See FCC Proposes New Equal Employment Opportunity (EEO) Rules for Broadcast and Cable*, MM Docket No. 98-204 (Dec. 12, 2001). Indeed, it is precisely because the FCC can fully achieve its EEO objectives without Option B and that option's record-keeping requirements that the FCC declined to seek further review. Consequently, the case does not present an issue of programmatic significance warranting this Court's review.

Moreover, far from establishing a broad precedent regarding the nature of facial challenges or the permissibility of data collection requirements, the court of appeals' decision rests primarily on putative facts that are potentially unique to this case and context. For example, even though the FCC's data collection rules do not require licensees to ensure that their applicant pools reflect the racial composition of the local community—and the FCC has disavowed any such requirement— the court of appeals found that licensees would still feel pressure to achieve such a result. That was true, the court found, because the FCC "has a long history of employing" a "variety of sub silentio pressures and 'raised eyebrow' regulation," Pet. App. 10a, and had "promise[d] to investigate any licensee that reports 'few or no' applications from women or minorities," *id.* at 11a. Such an investigation, the court found, is a "powerful threat, almost guaranteed to induce" licensees "to focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications." *Id.* at 11a, 11a-12a. The threat was particularly powerful, the court also suggested, given the FCC's supposed "life

and death power over the licensee," *i.e.*, the fact that an FCC decision denying renewal of or revoking a station's license will preclude that station's further operation and may put the broadcaster out of business. *Id.* at 11a. See also *Contemporary Media, Inc.* v. *FCC*, 214 F.3d 187 (D.C. Cir. 2000), cert. denied, 121 S. Ct. 1355 (2001).[5] Further, the court of appeals found that licensees would respond to the FCC's "pressure" by focusing resources on recruiting minorities and diverting resources from the recruitment of white males. Pet. App. 13a-14a & n.***.[6]

Of course, we disagree with each of those assertions. There is no reason to believe that the FCC would enforce its EEO guidelines in an unconstitutional fashion (*sub silentio* or otherwise). Nonetheless, no matter how questionable the court's factual suppositions may have been, they were *critical* to the court of

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[5] Under the Communications Act, the FCC has the responsibility of controlling radio and television channels and the power to license their use for limited periods of time. 47 U.S.C. 301. The FCC establishes qualifications for broadcasters, can compel the disclosure of certain information from them, and may grant or deny license applications in the public interest. 47 U.S.C. 303, 307, & 308 (1994 & Supp. V 1999). The FCC may alter, suspend, or revoke a license subject to certain procedural safeguards. 47 U.S.C. 312.

[6] The court of appeals' skepticism also appears to have been influenced by its view of the FCC's earlier regulatory efforts in this area. The court invalidated the FCC's predecessor regulations in *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998), because they were "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation," *id.* at 352, and had been criticized by the Justice Department for that very reason, *id.* at 353 (noting Justice Department concern that prior regulations operated as a "*de facto* hiring quota").

appeals' decision and, as a result, may render the decision *sui generis*. Indeed, precisely because the court's decision rests on what are, in essence, findings of fact regarding the nature of the program, its enforcement, and its likely effects, the decision is unlikely to bind future panels to any particular result in cases involving different agencies, with different histories, enforcing different compliance programs, on different factual records.[7] Indeed, the District Court for the District of Columbia relied on similar observations in distinguishing *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344, 351-353 (D.C. Cir. 1998); see note 6, *supra*, and upholding the FDIC's EEO regulations, notwithstanding some similarities between them and the FCC EEO rules invalidated in *Lutheran Church*. *Sussman* v. *Tanoue*, 39 F. Supp. 2d 13, 26 (D.D.C. 1999) (distinguishing FDIC EEO rules because the FCC regulations were thought by the D.C. Circuit to "create pressure on stations to eliminate under-representation through racial preferences" whereas the FDIC's program did "*not* lead to racial preferences"). In other words, the court's critical assumptions in this case—

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[7] It seems rather unlikely that the court of appeals will be willing to attribute to another agency a practice of using "raised eyebrow" pressure in the absence of record evidence so proving. Similarly, no other regulations are likely to have the sort of historical antecedents that the FCC's had. See note 6, *supra*. Further, it is not common for an agency to have the sort of "life or death" power the court attributed to the FCC. For example, agencies that provide contracting opportunities to private-sector companies, or grants for research projects to private organizations, do not have that kind of power. Most private enterprises can do business without contracting with the federal government. Broadcast licensees, in contrast, must deal with the FCC, because the FCC determines (subject to judicial review) whether or not they can receive or retain their broadcast licenses.

and its ultimate finding that the record-keeping requirement of Option B forces licensees to recruit minorities and women to the exclusion of nonminority males—are factual in nature and thus necessarily limited to this case. They are, furthermore, based on unique characteristics the court imputed to the FCC and the FCC's alleged enforcement practices, making it unlikely that the court's holding will have application beyond the FCC and this particular program.[8]

3. Finally, petitioner UCC is mistaken to assert (UCC Pet. (No. 01-662), at 27-28) that the court of appeals' decision creates a conflict in the circuits. Instead, each case cited by UCC involved distinct facts, and none involved the unique circumstances relied upon by the decision below.

For example, in *Raso* v. *Lago*, 135 F.3d 11, 17 (1st Cir.), cert. denied, 525 U.S. 811 (1998) (cited UCC Pet. (No. 01-662), at 27), the plaintiffs challenged a HUD decision which required certain apartments to be made

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[8] Petitioners MMTC and NOW also argue that the court of appeals, *sub silentio*, invalidated 47 U.S.C. 334(a), which prohibited the FCC from revising the EEO regulations in existence in 1992 or the forms used by licensees. MMTC/NOW Pet. (No. 01-639) at 25-28. However, as petitioners MMTC and NOW concede (at 27), it was not the decision below that required the FCC to revise its EEO regulations, but the earlier decision in *Lutheran-Church Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998); this case merely addressed the validity of the replacement regulations. Moreover, it is not at all obvious that Congress's direction that the FCC "shall not revise" its EEO regulations includes an obligation not to revise them in the face of a decision holding them unconstitutional. The effect of 47 U.S.C. 334(a), in any event, was not passed upon by the court of appeals, and no court has ever addressed it. Accordingly, this Court's review is unwarranted. *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

available to everyone, notwithstanding a state law that would have given preference to displaced residents who were predominantly white. The court found that the plaintiffs had "alleged no facts that, if proven, would reveal any secret discriminatory standard, pattern of past practice, or motive" of distinguishing among applicants based on race. *Id.* at 17. Similarly, there was no suggestion that the agency had an extraordinary power of "life and death." Here, in contrast, the court of appeals attributed a prohibited intent to the FCC (based on a variety of factors) and suggested that the FCC would use its allegedly extraordinary powers to achieve the desired result. See pp. 9, 18-19 & note 5, *supra*; Pet. App. 11a (declaring it "evident" that the FCC "with life and death power over the licensee is interested in 'results,'" (*i.e.*, ensuring racial proportionality in the applicant pool) "not process" (broad outreach), "and is determined to get them."). If *Raso* had arisen in the D.C. Circuit rather than the First Circuit, moreover, it very likely would have been resolved the same way. See *Lutheran Church*, 141 F.3d at 351 n.8 (distinguishing the HUD rulings at issue in *Raso* from the FCC's EEO regulations, because HUD's "racially neutral" requirement "that some of the apartments * * * be opened to all applicants" no "more implicated the equal protection guarantee than a nondiscrimination statute like Title VII").

Duffy v. *Wolle*, 123 F.3d 1026 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998) (cited UCC Pet. (No. 01-662) at 27), is similarly distinguishable. In that case, the plaintiff contended that he was the victim of gender discrimination in promotion, and argued that the defendant's use of outreach in recruiting was evidence of its intent to discriminate in promotion. *Id.* at 1038. Thus, there was no claim that the outreach program

itself violated the Constitution; no claim that the agency was coercing race- or gender-conscious decisions through "life-and-death" powers; and no claim that the outreach program *reduced* the scope of outreach to nonminority applicants. To the contrary, the court of appeals concluded that the outreach program there had created "a larger pool of qualified applicants." *Id.* at 1039. *South-Suburban Housing Center* v. *Greater South Suburban Board of Realtors*, 935 F.2d 868 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992) (cited UCC Pet. (No. 01-662, at 28) is distinguishable for similar reasons. It did not involve an equal protection challenge—it was a First Amendment challenge—and the outreach program in any event did not "deter" potential buyers based on race, reducing opportunities, but rather "create[d] additional competition in the housing market." 935 F.2d at 884.

The remaining cases cited by petitioner UCC (at 27-28)—*Peightal* v. *Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994); *Ensley Branch, NAACP* v. *Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994); and *Billish* v. *City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), cert. denied, 510 U.S. 908 (1993)—are similarly inapposite. None of the factual predicates relied on by the decision below (see pp. 18-19, *supra*) were present in those cases. Those cases, moreover, involved the selection of remedies for past discrimination that had been proved, and merely used the label "race neutral" in passing to describe outreach recruiting remedies that were viewed as less drastic than racial preferences in hiring or promotion. Because those cases involved the narrow tailoring of remedies for proven discrimination, they have no bearing on whether, in the absence of proven discrimination and under the facts posited by

the D.C. Circuit in this case, the FCC's EEO outreach regulations would be deemed constitutional.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioners MMTC and NOW also suggest that the Court hold the petition pending decision in *Adarand Constructors, Inc.* v. *Mineta*, No. 00-730. This Court dismissed the petition for a writ of certiorari in that case as improvidently granted. See 122 S. Ct. 511 (2001). Accordingly, there is no reason to hold this case pending decision in *Adarand*.

Nos. 01-639, 01-662

DEC 26 2001

In The
Supreme Court of the United States

MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL, ET AL.,
Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET. AL.,
Respondents.

OFFICE OF COMMUNICATIONS, INC.;
UNITED CHURCH OF CHRIST,
Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET. AL.,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION
FOR THE STATE BROADCASTERS ASSOCIATIONS

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QUESTION PRESENTED

Whether the court of appeals correctly vacated the Federal Communications Commission's so-called "Equal Employment Opportunity Rule" because it was a race-based classification that violated the Fifth Amendment and the unconstitutional provisions could not be severed to leave a rule that fulfilled its intended purposes.

CORPORATE DISCLOSURE STATEMENT

Respondents State Broadcasters Associations, with the exception of the Georgia Association of Broadcasters, are all non-profit, incorporated trade associations comprised of broadcast station members. The Georgia Association of Broadcasters is an incorporated, for-profit trade association. None of the State Associations has issued any share or debt securities to the public. No parent company or publicly-held company has an ownership interest in any of the State Associations.

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STATEMENT OF THE CASE

1. The court of appeals correctly ruled that the FCC's so-called "equal employment opportunity" rule (the "EEO rule") was a race-based classification that violated the Fifth Amendment. *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, *reh'g & reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001) (Pet. App. 1a). Neither the Federal Communications Commission ("FCC") nor the United States of America has requested review of that ruling. Indeed, in the wake of the court of appeals' decision, the FCC has adopted a Second Notice of Proposed Rulemaking seeking comments on a proposed new EEO rule. *See* Press Release, Federal Communications Commission, FCC Proposes New Equal Employment Opportunity (EEO) Rules for Broadcast and Cable (December 13, 2001), *available at* http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0117.html. By initiating the rulemaking, the FCC indicates that it can formulate a new rule that will serve the agency's purposes and comply with the Constitution.

2. The Petitioners, most of which were intervenors in the court of appeals, do not seek review of the Fifth Amendment issue that was the focal point of the parties' arguments and the court of appeals' decision below. Rather, they present to this Court an issue relating to the standards for a facial challenge to the EEO rule, an issue that was never raised by any party prior to the court of appeals' initial ruling and was raised only cursorily on rehearing in the court of appeals by one of the Petitioners.

3. The facts leading to the court of appeals' decision are as follows. In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998), the court of appeals held that an earlier version of the FCC's EEO rule was an unconstitutional race-based classification because it pressured broadcasters to hire employees based on race and

could not survive strict scrutiny. Neither the FCC, the United States, nor any other party sought review by the Court.

On remand of *Lutheran Church*, the FCC initiated a rule-making proceeding to remedy the constitutional flaws identified by the court of appeals. In response, the State Associations submitted a proposal to the FCC that would have provided for broad outreach in recruitment to the entire public, without any reference to the race, ethnicity or gender of applicants or employees. The FCC rejected this proposal and adopted instead a new EEO rule that not only re-imposed on broadcasters many of the same race, ethnicity and gender-based affirmative action and reporting requirements contained in the prior rule, but also added new burdensome requirements. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report and Order, MM Docket Nos. 96-16, 98-204, 15 F.C.C. Rcd. 2329 (2000) (the "*EEO R&O*") (Pet. App. 49a).

The exclusive focus of the new EEO rule was on "women and minorities", *not*, as Petitioners suggest, on the "entire community." Pet. 17. Race, ethnicity and gender were the *only* traits that the new rule referenced in the recruitment procedures it imposed on broadcasters. *See EEO R&O* at ¶¶ 78-9, 104 (Pet. App. 113a-117a, 134a); 47 C.F.R. § 73.2080(d)(2) (Pet. App. 43a-44a). The new EEO rule was concerned only with certain classes of people on whom the FCC chose to bestow a special status – classes defined by racial, ethnic and gender classifications. *See, e.g., EEO R&O* at ¶ 113 (Pet. App. 138a); 47 C.F.R. § 73.2080(c)(2)(iii), (xii) (Pet. App. 39a-40a). The rule did not require stations to maintain data reflecting whether recruitment sources generated applicants who were, for example, members of particular religious groups, or who were from particular socioeconomic backgrounds; rather, it required the maintenance of data with respect *only* to race, ethnicity and gender in connection with Option B. Moreover, the

FCC warned that it was prepared to investigate broadcasters that reported "few or no" job applications from women or minorities. *See, e.g., EEO R&O* at ¶ 120 (Pet. App. 142a).

4. The court of appeals correctly ruled that the new EEO rule pressured broadcasters into recruiting on the basis of race, and was therefore a race-based classification that violated the equal protection component of the Fifth Amendment's Due Process Clause. *MD/DC/DE Broadcasters*, 236 F.3d 13 (Pet. App. 1a). The court made this decision in the context of its experience with the Commission's long history of pressuring broadcasters to induce conduct desired by the agency, including *sub silentio* pressures and "raised eyebrow" regulation. *Id.* at 19 (quoting *Community-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978)) (Pet. App. at 10a-11a). In these circumstances, the FCC's warning about investigations of broadcasters that reported "few or no" applications from women or minorities was "a powerful threat, almost guaranteed to induce the desired conduct." (Pet. App. 11a).

The court of appeals correctly held that the unconstitutional provisions of the rule could not be severed and that the entire EEO rule should therefore be vacated. *MD/DC/DE Broadcasters*, 236 F.3d at 22-23; 253 F.3d at 733-736 (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)) (Pet. App. 17a-18a; 21a-26a). The court did not accept the suggestion of many of the Petitioners to sever the unconstitutional portions of the rule by "cut[ting] out all references to 'minorities' in the regulation, thereby leaving the regulation intact with respect to women," because the Commission's intention was always to treat women and minorities identically. *Id.* (Pet. App. 18a). As for Option B of the rule, since one of the FCC's expressed purposes in adopting the rule was to afford broadcasters broad flexibility, the court correctly found that the rule "could not, without Option B, sensibly serve the goals for which it was designed." *Id.* (Pet. App. 22a; *see* 21a-26a).

5. The FCC and the United States did not question the State Associations' right to bring a facial challenge to the rules in the court of appeals. Indeed, the only mention by any party of any supposed problem with such a challenge was a short discussion in a petition for rehearing filed by the Office of Communication, Inc., United Church of Christ ("UCC"). UCC Petition for Rehearing or Rehearing *En Banc* at 18-19.

REASONS FOR DENYING THE PETITION

Neither the United States nor the FCC has sought review of this case. The petitions for writs of certiorari should be denied because (1) the court of appeals' decision does not interfere with the FCC's ability to fulfill any statutory mandate it may have; (2) the case has no necessary impact on the ability of other agencies of the federal government to enforce their regulations concerning employment discrimination or data collection; (3) the court of appeals correctly applied this Court's precedent in finding the FCC rule invalid on its face; (4) the severance issue requires an inquiry into specific and peculiar facts relating to the FCC's intent and the structure of the rule in question that is not appropriate for review by this Court; and (5) Petitioners' arguments that the case is related to disposition of *Adarand* are moot because the Court dismissed the writ of certiorari as improvidently granted in that case. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed sub nom. Adarand Constructors, Inc. v. Mineta*, 70 U.S.L.W. 4025 (U.S. Nov. 27, 2001) (No. 00-730). Moreover, the pendency of the proceeding initiated by the FCC's Second Notice of Proposed Rulemaking to fashion new EEO rules consistent with the court of appeals' decision, makes review by the Court of the old rules unnecessary.

I. THE FCC HAS INITIATED A RULEMAKING TO IMPLEMENT ITS "EQUAL OPPORTUNITY" OBJECTIVE IN A CONSTITUTIONAL MANNER AND IS NOT HINDERED IN ITS ABILITY TO PURSUE ANY LAWFUL MANDATE.

Rather than seeking review of the court of appeals' decision, the FCC has adopted a Second Notice of Proposed Rulemaking seeking comments on new EEO rules proposed in response to the court of appeals' decision. *See* Press Release, Federal Communications Commission, FCC Proposes New Equal Employment Opportunity (EEO) Rules for Broadcast and Cable (December 13, 2001), *available at* http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0117.html. The FCC apparently believes it can promulgate a new rule that both serves its purposes and is consistent with the court of appeals' decision. Therefore, any review by this Court is inappropriate.

The FCC's determination to adopt a new rule also makes it premature, to say the least, for Petitioners to argue that the FCC cannot meet its statutory obligations or that the court of appeals' decision somehow "*sub silentio*" struck down Section 334(a) of the Communications Act, 47 U.S.C. 334(a). The FCC's initiation of new EEO rulemaking presupposes that the agency can fulfill any statutory mandate the agency may have, consistent with the court of appeal's decision.

II. THE COURT OF APPEALS' DECISION DOES NOT INTERFERE WITH THE ABILITY OF OTHER GOVERNMENT AGENCIES TO ENFORCE REGULATIONS.

Contrary to the claims of the Petitioners, the court of appeals' decision has no necessary implications for the ability of other agencies to enforce their rules concerning

employment discrimination or data collection. The United States would surely have sought review if, as Petitioners suggest, the court of appeals' decision broadly undercut administrative agencies' ability to enforce their own regulations. The United States was correct when it told the court of appeals that the FCC's regulations were different from hiring regulations of other federal agencies because of the *pressure* that the FCC is able to impose on its licensees. *See generally Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 436-437 (1963) (quoting commentators stating, the "licensing power of the FCC...hangs like a constant Damocles' sword over broadcasting" and that the FCC's informal powers resulted in "regulation of programming by raised eyebrow"). As the United States told the court of appeals:

> The licensing authority of the FCC is indeed a powerful tool; the FCC exerts a great deal of influence over holders of broadcast licenses and can revoke a license where a licensee fails to comply with the agency's rules and policies.... Under the Communications Act, the FCC has the responsibility of controlling radio and television channels, and the power to license their use for limited periods of time. The FCC establishes qualifications for broadcasters, can compel the disclosure of certain information from them, and may grant or deny license applications in the public interest. The FCC may alter, suspend, or revoke a license subject to certain procedural safeguards. Indeed, a decision by the FCC to revoke a station's license will essentially render the station inoperable and likely put the broadcaster out of business.

Response of the United States to Petitions for Rehearing and Petitions for Rehearing *En Banc*, at 9 (citations omitted).

The court of appeals ruled that certain aspects of the EEO Rule provided "evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them." *MD/DC/DE Broadcasters*, 236 F.3d at 19 (Pet. App. at 11a). As the United States explained below, this concern would not apply in the context of other agency programs, and the court of appeals' decision therefore does not have clear precedential value concerning those programs. Response of the United States to Petitions for Rehearing and Petitions for Rehearing *En Banc*, at 9-10.

III. THE COURT OF APPEALS' INVALIDATION OF THE EEO RULE ON ITS FACE COMPORTS WITH COURT PRECEDENT AND PETITIONERS HAVE IDENTIFIED NO CIRCUIT COURT SPLIT ON THIS ISSUE REQUIRING RESOLUTION.

The petitions presented to this Court offer no good reason for the Court to review the court of appeals' invalidation of the EEO rule. While both petitions cite *United States v. Salerno*, 481 U.S. 739, 745 (1987), the mere invocation of that decision does not show that the court of appeals' decision conflicts with this Court's precedent on standards for facial challenges. *See* Minority Media & Telecommunications Council, et al. Pet. at 14; Office of Communication, Inc., United Church of Christ Pet. at 15. Indeed, as this Court stated in *City of Chicago v. Morales*, "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself...." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). The Court went on to say that it is "doubtful" that it "would be appropriate for federal courts to apply the *Salerno* standard in some cases." *Id.*

The court of appeals was squarely within the bounds of Court precedent when it concluded that the EEO rule would pressure broadcasters to make employment decisions on the basis of race because of the overarching power the FCC has over licensees and the requirements of the rule itself. The court of appeals recognized that the FCC, through its licensing authority, wields the ultimate power of "life or death" over broadcasters. From this, the court of appeals properly concluded that the FCC's imposition of the EEO rule inherently pressured broadcasters to engage in unconstitutional discrimination in order to comply with the rule and to avoid investigation. This does not contradict Court precedent in any respect.

The petitions for review disagree with the court of appeals' decision and attempt to alchemize their disagreement into a facial challenge issue. While they are correct to assert that striking down a statute or regulation on a facial challenge is "strong medicine," this Court has not hesitated to dispense such a dose in the face of constitutional maladies such as those diagnosed by the court of appeals in this case. The court of appeals was not required to engage in intellectual acrobatics to envision a marginal instance where the rule might not cause an employer to employ race as a factor in employment decisions. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992) (using as its standard the "large fraction of the cases in which [the law] is relevant"). *See also Bigelow v. Virginia*, 421 U.S. 809, 817 (1975) (holding a statute invalid because the facts well illustrate "the statute's potential for sweeping and improper applications") (citation omitted). Because there is no conflict with Court precedent and the petitions have not identified any split within the circuit courts on this issue, there is no cause to grant review of the issue presented by Petitioners.

IV. THIS COURT DOES NOT GRANT CERTIORARI TO REVIEW THE SPECIFIC EVIDENCE AND FACTS NECESSARY TO A DISPOSITION OF THE SEVERANCE ISSUE IN THIS CASE.

The requests for review should also be rejected because the issue presented turns on the peculiar facts relating to the FCC's intent and the structure of the EEO rule and the Court does not grant certiorari to "review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.") The legal standard for whether severance is appropriate is established by *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988), as explained by the court of appeals: "[w]hether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters*, 236 F.3d at 22; 253 F.3d at 733-734 (Pet. App. 17a, 21a-22a). The question presented by Petitioners can be resolved only by examining, as the court of appeals correctly did, the specific purposes and structure of the EEO rule and other indicia of the FCC's intention. The court of appeals properly focused, for example, on the FCC's expressed purpose to afford smaller broadcasters broad flexibility to tailor their own programs, and whether a severed rule could still sensibly serve that purpose. *MD/DC/DE Broadcasters*, 236 F.3d at 22-23 (Pet. App. 22a). Review on the question presented by Petitioners would require the Court to review these particular and correct determinations, and is not warranted.

V. THE COURT'S DISMISSAL OF *ADARAND CONSTRUCTORS, INC. v. MINETA* RENDERS MOOT PETITIONERS' ARGUMENTS RELATING TO *ADARAND'S* DISPOSITION.

Petitioners' attempt to align this case with the Court's review of *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed sub nom. Adarand Constructors, Inc. v. Mineta*, 70 U.S.L.W. 4025 (U.S. Nov. 27, 2001) (No. 00-730), fails for at least two reasons. First, the Court's dismissal of *Adarand* disposes of Petitioners' argument that this case should be held pending a decision on the merits in that case. Second, the issue presented for review here had no relation to the issues initially accepted for review in *Adarand*. At issue in *Adarand* were the particularized standards of the Department of Transportation's Disadvantaged Business Enterprise program and the implementation of those particularized standards – and, most importantly, whether those standards and that implementation were consistent with the Fifth Amendment. Petitioners here have not presented *any* issue concerning the Fifth Amendment. Rather, they have posed a question about the nature of facial challenges to administrative decisions.[1]

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[1]For the same reason, the supposed conflict mentioned by the UCC in its petition (at 27-28) is of no significance. The alleged conflict relates to whether so-called recruitment "outreach" requirements violate the Fifth Amendment, and this has nothing to do with the issue presented here concerning facial challenges to regulations. In any case, as the court of appeals explained, there is no conflict on the Fifth Amendment issue between its decision and those of other circuits. *MD/DC/DE Broadcasters*, 236 F.3d at 20 (Pet. App. 12a-13a).

CONCLUSION

The petitions for a writ of certiorari should be denied.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL ET AL.,
Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The federal respondents (the United States and the Federal Communications Commission ("FCC")) and the State Broadcasters Associations ("Broadcasters") have opposed the petition for a writ of certiorari herein. Significantly, the federal respondents nonetheless explain in great detail how the court of appeals erred in striking down the FCC's equal employment opportunity ("EEO") rules on a facial challenge (in direct contravention of this Court's well-established precedents, as we showed in our petition). Both responses labor mightily to downplay the significance of the decision below, urging that the case will be confined to its facts and that the FCC remains free to adopt new EEO rules.

In this reply, we show that the court of appeals' decision cannot be written off so easily. Quite to the contrary, the decision below calls into doubt for the first time efforts by government agencies to collect data on employment and race, and threatens to bring about wholesale changes in the way facial challenges to statutes and regulations are evaluated. And although the FCC has proposed new EEO rules that would effectively reinstate Option A of the regulations that were struck down by the D.C. Circuit, the FCC will have to go through a rulemaking proceeding hamstrung unnecessarily by a flawed decision unless this Court vacates or reverses the decision below. Furthermore, any new regulations that result from the FCC's rulemaking will be subject to judicial review in the D.C. Circuit under precedent that disregards this Court's facial challenge case law. For these reasons, petitioners urge that their petition for a writ of certiorari be granted.

A. The Court of Appeals Did Not Simply Misapply, But Rather Ignored, This Court's Standards for Reviewing Facial Challenges.

The federal respondents acknowledge the serious constitutional errors in the decision below. Federal Respondents' Br. at 15–17. In contrast, the Broadcasters

attempt to justify the court of appeals' decision on the merits, but their tepid defense actually highlights the critical flaws in the decision. The court of appeals did not engage in "intellectual acrobatics" (Broadcaster Br. at 8) to envision a scenario where the regulations could be upheld, but concocted one (without any record support) under which they could be struck down. That approach contravenes any standard used by this Court to evaluate facial constitutional challenges.[1]

Having acknowledged that the decision is seriously flawed, the federal respondents strive to downplay its significance by contending that the court of appeals simply erred in applying

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[1] The Broadcasters suggest that petitioners have improperly relied on *United States v. Salerno*, 481 U.S. 739 (1987), as the sole standard for reviewing facial challenges. To the contrary, our petition notes that *Salerno* states *one* formulation of the facial challenge test, and provides examples of other such formulations used by this Court. See Minority Media and Telecommunications Council ("MMTC") *et al.* Petition at 14 n.9. The Broadcasters also oversimplify *Salerno*, arguing (at 7) that *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), rejects *Salerno*'s facial challenge formulation. In fact, *Morales* did not dispute the first part of the *Salerno* test, which states that even if a law "might operate unconstitutionally under some conceivable set of circumstances," that fact is "insufficient to render [the law] wholly invalid." 481 U.S. at 745. That conclusion is relevant here, as the court of appeals struck down the EEO Rules because it conceived of a circumstance in which the FCC might implement the Rules improperly. The second part of the *Salerno* test, disputed by three Justices in *Morales*, requires that to uphold a facial challenge, the challenger must prove "that no set of circumstances exists under which the Act would be valid." *Id.* But the facial constitutionality of the FCC's regulations does not depend upon any particular test, because the rules satisfy each such standard that this Court has previously identified.

The Broadcasters also cite *Bigelow* v. *Virginia*, 421 U.S. 809, 817 (1975), as an example of this Court's application of its facial challenge standards. Broadcaster Br. at 8. In *Bigelow*, however, the Court "decline[d] to rest [its] decision" on the facial challenge question, and instead decided "whether the statute *as applied* to appellant infringed constitutionally protected speech." 421 U.S. at 818 (emphasis added).

settled law to case-specific facts. Even if that were all the court below had done, the case still would be worthy of review because it serves as a seriously flawed precedent that could adversely affect the development of the law. But in fact, the court of appeals did much more than just misapply the law. It struck down regulations as unconstitutional on their face only by ignoring and flouting this Court's precedents. The court below also made broad pronouncements about the negative impacts of inclusive recruiting practices, to the effect that such recruiting will inevitably result in some individuals or groups not receiving information about employment opportunities that they would otherwise have obtained. See App. 13a-14a. Those pronouncements were not findings of fact based on record evidence, but critical elements of the court's legal analysis.

The most obvious impact of the decision below is that it can be used to attempt to constrain the ability of government agencies to collect information about employment and race. See Federal Respondents Br. at 15 (noting that many agencies collect such data to ensure compliance with nondiscrimination requirements); MMTC *et al.* Petition at 22 & n.12 (citing examples of government race and gender data collection). Notwithstanding the respondents' contentions, the decision below can be read to cast doubt on the constitutionality of such data reporting requirements, as the decision permits courts to speculate that such programs could "pressure" employers into discriminating.[2]

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[2] In addition, the court of appeals's decision could be read as effectively striking down in part section 334(a) of the Communications Act of 1934, which prohibited the FCC from revising its EEO rules or "the forms used by [broadcast] licensees and permittees to report pertinent employment data to the Commission." 47 U.S.C. § 334(a), App. 279a. One of the forms codified by section 334(a) was Form 396, which required licensees to report the sources used to attract applications from minorities and women, and the number of referrals from those sources.

Even more significantly, the decision below invites anyone making a facial constitutional challenge to regulations or statutes to advocate that laws should be struck down based on speculation about their effects. That the court below did not openly admit that its method for evaluating a facial challenge was in direct conflict with this Court's precedents (and those of every other court of appeals) does not make this matter any less worthy of further review. Lower court decisions are not insulated from review by this Court when they ignore binding precedent instead of questioning openly its application in a particular context. In any event, the conflict between the decision below and this Court's facial challenge case law could not be any more plain. And this Court has granted certiorari in cases where the conflict between a court of appeals decision and this Court's decisions was not necessarily explicit.[3] Furthermore, certiorari is also appropriate in cases where a decision on a matter of public importance was obviously incorrect.[4]

Respondents also seek to downplay this case by contending that it will be viewed as agency specific. But this case is worthy of review even if it could be limited in that manner (which, as we discuss below, is highly unlikely). The decision below could have profound effects on the FCC's ability to carry out its congressional mandate, and not just in the context of

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[3] See, *e.g.*, *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 733 (1982) (certiorari granted because the ruling below "appeared to be in conflict with our precedents"); *Braen* v. *Pfeifer Oil Transp. Co.*, 361 U.S. 129, 130 (1959) (certiorari granted because the ruling below "seemed to be out of line with the authorities").

[4] See, *e.g.*, *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (certiorari granted where state court had incorrectly applied federal preemption doctrine); *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 336 (1982) (certiorari granted because undisputed facts disclosed a Sherman Act violation).

equal employment opportunity. Among other things, the decision below suggests that concerns over the FCC's theoretical use of its licensing power authorize courts of appeals to analyze the facial constitutionality of FCC regulations under standards that are far less deferential than those that apply elsewhere.

In any event, the decision below cannot be cabined as peculiar to the FCC. The court of appeals' approach to resolving the Broadcasters' facial challenge—while obviously undertaken in a case involving FCC rules—applies as well to regulations promulgated by other administrative agencies. The court of appeals' finding of "pressure" to recruit minorities was grounded in the ability of agencies to subtly influence regulated entities into compliance with agency objectives. In fact, the court of appeals relied upon decisions involving *other agencies* in reaching its conclusions. *E.g.*, App. 11a (relying upon *Chamber of Commerce* v. *Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999), which recognized OSHA's leverage over employers due to its inspection and sanction powers).

Furthermore, lower courts will not necessarily be persuaded to distinguish away the decision below based on the FCC's licensing power over broadcasters. Federal, state, and local government agencies impose a variety of licensing and permitting requirements that can, directly or indirectly, affect an individual's or a company's ability to stay in business.[5] And the award or loss of government contracts or grants, as well as law enforcement action outside the context of licenses or permits, obviously can and does influence individual and corporate business behavior in a variety of contexts, even when

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[5] Even where, for instance, the government does not require a license to engage in a particular kind of business, the need to obtain permits because of secondary effects from engaging in a particular kind of business (such as permits necessary to discharge regulated substances into the environment) can be critical to the continued operation of a business.

they do not threaten to put anyone out of business. Thus, the decision below plainly can be used to raise serious questions about the constitutionality of statutes or regulations enforced by agencies other than the FCC.

Finally, the government's optimistic prediction that the FCC's licensing power will render the decision below *sui generis* is not borne out by the reaction to *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998). Even though *Lutheran Church* turned in significant part on the FCC's investigative power over broadcasters, several courts of appeals have, in cases not involving the FCC, relied on *Lutheran Church* to conclude that other government efforts to encourage minority participation can be as unconstitutional as mandatory racial preferences. See, *e.g.*, *W.H. Scott Constr. Co.* v. *City of Jackson*, 199 F.3d 206, 215 (5th Cir. 1999) (striking down city policy on minority participation "goal" for construction contracts); *Safeco Ins. Co. of Am.* v. *City of White House*, 191 F.3d 675, 689-92 (6th Cir. 1999) (raising serious constitutional doubts about EPA contracting policy while remanding for further proceedings). Petitioners are not questioning the result in *Lutheran Church* or the decisions following it. Nonetheless, regardless of whether these decisions are correct, they suggest strongly that some courts will not limit the decision below to its facts.

In short, the decision below clearly is worthy of review. That the court of appeals (1) upheld a facial challenge doing precisely what this Court's precedents forbid, (2) essentially treated this case as though it involved an as-applied challenge to the regulations, and (3) drew conclusions that had no record support and were precisely the opposite of those intended by the FCC, are reasons enough to grant certiorari. Even more significantly, the decision below cannot realistically be confined

to the peculiar set of facts concocted by the court of appeals, or even to the actions of one agency.[6]

B. The FCC's Proposed Rule Making Does Not Lessen the Importance of This Case.

The FCC's issuance of a Notice of Proposed Rule Making concerning new EEO rules does not in any way diminish the importance of this case. We agree that the FCC arguably should be able to, within the confines of the decision below, reinstate Option A. But the decision below robs the FCC of considerable flexibility in the design of new EEO regulations and other future regulations.

For example, Option B of the existing regulations presented broadcasters and cable operators with a unique opportunity to experiment in recruiting outreach, by designing their own program to ensure that information about job openings is distributed widely. Experience under Option B could have, over time, produced valuable data that would have shown the FCC and the industry efficient methods to improve recruiting outreach and possibly to expand the menu of recruiting devices broadcasters and cable operators can select from under Option A. This experiment, however, was cut short prematurely and unnecessarily by the decision below. If this Court were to grant certiorari and then vacate the decision below, the FCC's outreach experiment could continue. The FCC could then, if it wanted to, still improve on the regulations further, without

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[6] *The Broadcasters also argue that the facial challenge question was not the focus of the proceedings below. Broadcaster Br. at 1. In fact, the issue was squarely raised by the Office of Communication, Inc., United Church of Christ in its Petition for Rehearing or Rehearing En Banc (at 18-19). Further, Judge Tatel, in his dissent from the denial of rehearing en banc, discussed the issue at length. App. 27a-32a. Moreover, the facial challenge issue arose out of the court of appeals' method of resolving this case. No party would have predicted prior to the panel's decision that the court would ignore this Court's facial challenge jurisprudence altogether.*

being bound by a court of appeals decision that the federal respondents acknowledge was wholly flawed. In short, Option B allowed the EEO rules to be more flexible and presented opportunities for fine tuning, which should only have enhanced their constitutionality. The FCC should not be forced to give up Option B just because the court of appeals insisted on imagining only a worst-case scenario.

Even if the FCC were committed to discarding Option B at this point (and it has given no indication that it would discard Option B if it were still available), the FCC's rulemaking process (and any other EEO rulemakings initiated by other agencies that may be initiated in the light of the decision below) would be enhanced by further review of the decision below. This Court could provide guidance (apparently much needed, given the decision below) on how to evaluate facial challenges based on equal protection grounds. This guidance would ensure that any facial challenges to regulations the FCC might promulgate in the future would be considered under the proper standard.[7] In sum, this case is still important, notwithstanding the FCC's decision to institute a new EEO rulemaking.

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[7] *It is highly unlikely that the grant of certiorari in this case would delay materially, if it all, the effective date of any new rules. Comments and reply comments on the proposed rules are not due for several months, and the FCC will require several additional months to issue its report and order if it chooses to promulgate new EEO regulations. Accordingly, a merits decision by this Court issued by the end of this Term would allow the FCC to complete its rulemaking proceeding in a timely manner.*

CONCLUSION

The petition for a writ of certiorari should be granted.

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